

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE LUCY H. KOH
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

FOR THE PLAINTIFFS: JOSEPH SAVERI LAW FIRM
BY: JOSEPH SAVERI
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JAMES G. DALLAL
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LIEFF, CABRASER,
HEIMANN & BERNSTEIN
BY: KELLY M. DERMODY
BRENDAN P. GLACKIN
DEAN M. HARVEY
ANNE B. SHAVER
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275 BATTERY STREET, 30TH FLOOR
SAN FRANCISCO, CALIFORNIA 94111

APPEARANCES CONTINUED ON NEXT PAGE

OFFICIAL COURT REPORTER: LEE-ANNE SHORTRIDGE, CSR, CRR
CERTIFICATE NUMBER 9595

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY
TRANSCRIPT PRODUCED WITH COMPUTER

1 APPEARANCES (CONTINUED)

2 FOR DEFENDANT
3 GOOGLE:

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10 FOR DEFENDANT
11 APPLE:

O'MELVENY & MYERS
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12 FOR DEFENDANTS
13 ADOBE AND
14 INTUIT:

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15 FOR DEFENDANT
16 INTEL:

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FRANK HINMAN
SUJAL SHAH
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19 FOR DEFENDANT
20 PIXAR:

COVINGTON & BURLING
BY: EMILY J. HENN
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1 SAN JOSE, CALIFORNIA

AUGUST 8, 2013

2 P R O C E E D I N G S

3 (COURT CONVENED AND THE FOLLOWING PROCEEDINGS WERE HELD:)

4 THE CLERK: CALLING CASE NUMBER C-11-02509 LHK, IN
5 RE: HIGH-TECH EMPLOYEE ANTITRUST LITIGATION.

6 MR. GLACKIN: BRENDAN GLACKIN, LEIFF, CABRASER,
7 HEIMANN & BERNSTEIN ON BEHALF OF THE PLAINTIFFS.

8 MS. DERMODY: GOOD AFTERNOON, YOUR HONOR.

9 KELLY DERMODY, LEIF, CABRASER. AND THE OTHER LEIF, CABRASER
10 PEOPLE WITH US ARE MY PARTNER, DEAN HARVEY, AND ASSOCIATES
11 ANNE SHAVER AND LISA CISNEROS.

12 AND ALSO IN THE COURTROOM TODAY ARE NAMED PLAINTIFFS,
13 BRANDON MARSHAL AND MIKE DEVINE.

14 THE COURT: OKAY.

15 MR. SAVERI: GOOD AFTERNOON, YOUR HONOR.
16 JOSEPH SAVERI. WITH ME FROM MY OFFICE ARE LISA LEELOVE AND
17 JAMES DALLAL.

18 THE COURT: OKAY.

19 MR. VAN NEST: GOOD AFTERNOON, YOUR HONOR.
20 BOB VAN NEST FROM KEKER & VAN NEST FOR GOOGLE. I'M HERE WITH
21 DAN PURCELL AND TINA SESSIONS.

22 ALSO, LEE RUBIN FROM MAYER BROWN.

23 AND I'VE BEEN ASKED TO SPEAK ON BEHALF OF ALL DEFENDANTS
24 THIS AFTERNOON.

25 MR. RILEY: GOOD AFTERNOON, YOUR HONOR. GEORGE RILEY

1 OF O'MELVENY & MYERS FOR APPLE. I'M JOINED BY MY COLLEAGUES
2 CHRISTINA BROWN AND MICHAEL TUBACH.

3 THE COURT: OKAY. GOOD AFTERNOON.

4 MR. PICKETT: GOOD AFTERNOON. DONN PICKETT. I'M
5 HERE ALONG WITH FRANK HINMAN AND SUJAL SHAH FOR INTEL.

6 THE COURT: OKAY. GOOD AFTERNOON.

7 MR. KIERNAN: GOOD AFTERNOON, YOUR HONOR.

8 DAVID KIERNAN OF JONES DAY ON BEHALF OF ADOBE. HERE WITH ME
9 TODAY IS LIN KAHN. BOB MITTELSTAEDT COULDN'T BE HERE TODAY
10 BECAUSE OF TRIAL ON ANOTHER MATTER.

11 THE COURT: OKAY. MR. KIERNAN AND? I'M SORRY.

12 MR. KIERNAN: AND LIN KAHN.

13 THE COURT: OKAY. THANK YOU.

14 OKAY. AND THERE'S NO ONE HERE FOR LUCASFILM, PIXAR, AND
15 INTUIT; CORRECT?

16 MS. HENN: YOUR HONOR, EMILY HENN, COVINGTON &
17 BURLING. I'M HERE FOR THE CMC FOR PIXAR.

18 THE COURT: OKAY. WOULD YOU MIND IF WE DID THAT AT
19 THE END, OR WOULD YOU LIKE TO DO THAT AT THE BEGINNING? IS
20 THAT OKAY IF IT'S AT THE END?

21 MS. HENN: YES.

22 MR. STEWART: YOUR HONOR, CRAIG STEWART. I'M HERE ON
23 BEHALF OF INTUIT.

24 THE COURT: OKAY. ALL RIGHT. WELL, GOOD AFTERNOON
25 TO EVERYONE.

1 SO ACTUALLY THE FIRST QUESTION WOULD GO TO INTUIT,
2 LUCASFILM, AND PIXAR, AS WELL AS THE PLAINTIFFS.

3 WHEN DO YOU ANTICIPATE FILING YOUR MOTION FOR PRELIMINARY
4 APPROVAL?

5 MS. DERMODY: WELL, YOUR HONOR, WE ARE HEAVILY IN THE
6 PROCESS OF TRYING TO DOCUMENT THAT AGREEMENT, AND WITH THE
7 ADDITION OF THE INTUIT SETTLEMENT, WE HAVE ANOTHER FAMILY TO
8 DEAL WITH IN FIGURING OUT THE BEST PROCESS.

9 WE'RE HOPING TO DO THAT VERY, VERY SOON. WE'RE WORKING
10 HARD TO ACCOMPLISH THAT, YOUR HONOR.

11 THE COURT: CAN WE SET A DEADLINE BY WHICH THAT WILL
12 BE DONE?

13 MR. SAVERI: I THINK THERE ARE PROBABLY TWO THINGS WE
14 WOULD NEED TO DO: SET A DEADLINE FOR FILING THE PRELIMINARY
15 APPROVAL PAPERS; AND THEN WE WOULD LIKE TO COME IN AS SOON AS
16 POSSIBLE AND HAVE THE HEARING ON PRELIMINARY APPROVAL.

17 THE COURT: WELL, I HAVE SOME POSSIBLE HEARING DATES
18 FOR YOU, SO I NEED TO KNOW WHEN YOU'RE GOING TO FILE AND WE CAN
19 GO FROM THERE.

20 MS. DERMODY: WHAT DO YOU HAVE, YOUR HONOR?

21 THE COURT: SO --

22 MS. DERMODY: THAT MIGHT GIVE US A TARGET.

23 THE COURT: WELL, OCTOBER 3RD, NOVEMBER 21,
24 DECEMBER 19, JANUARY 9, FEBRUARY 13, FEBRUARY 20.

25 MR. SAVERI: YOUR HONOR, CAN THE -- IS THERE ANY WAY

1 TO GET IN EARLIER THAN THAT FOR THE PRELIMINARY APPROVAL
2 HEARING?

3 THE COURT: EARLIER THAN OCTOBER 3? WHEN ARE YOU
4 GOING TO FILE?

5 MS. HENN: YOUR HONOR, I THINK THAT WOULD BE
6 AGGRESSIVE IN LIGHT OF WHERE WE ARE AT THIS POINT IN TIME, SO I
7 THINK WE WOULD SUPPORT A DATE NO EARLIER THAN OCTOBER.

8 THE COURT: WELL, HOW QUICKLY ARE YOU GOING TO FILE?

9 MR. SAVERI: WELL, THE -- I DON'T -- I'M HOPING,
10 MAYBE I'M OVERLY OPTIMISTIC, THAT WE'LL HAVE THE DOCUMENTATION
11 DONE IN A COUPLE WEEKS AND WE WOULD PREPARE -- BE PREPARED TO
12 FILE SHORTLY THEREAFTER.

13 THE PRELIMINARY APPROVAL HEARING IS GOING TO BE UNOPPOSED.

14 THE COURT: SO THERE HAVE BEEN NO EXCHANGES OF DRAFTS
15 YET OF FINAL DOCUMENTS?

16 MR. SAVERI: NO, WE HAVE EXCHANGED DOCUMENTS.

17 MR. STEWART: NOT WITH INTUIT, YOUR HONOR. WE
18 HAVEN'T RECEIVED THE SETTLEMENT DOCUMENTS YET.

19 THE COURT: I SEE. WHAT ABOUT PIXAR AND LUCASFILM?

20 MS. HENN: WE'VE RECEIVED ONE DOCUMENT, BUT THERE ARE
21 MANY DOCUMENTS THAT WE HAVEN'T SEEN, AND IT TOOK A WHILE TO GET
22 THE FIRST DOCUMENTS.

23 SO WE DO THINK THIS IS GOING TO TAKE SOME TIME AND
24 SHOULDN'T BE RUSHED.

25 THE COURT: OKAY. SO GIVE ME A DEADLINE THAT SEEMS

1 REALISTIC FOR FILING THE MOTION, AND THEN YOU CAN PICK ANY OF
2 THESE DATES FOR THE HEARING.

3 MS. DERMODY: IF WE'RE WORKING FROM OCTOBER 3RD, YOUR
4 HONOR, I THINK THE REAL QUESTION THEN IS HOW MUCH TIME DO YOU
5 THINK YOUR HONOR WOULD LIKE TO HAVE WITH THE PAPERS BEFORE THE
6 HEARING? BECAUSE AS MR. SAVERI SAID, IT WILL BE UNCONTESTED,
7 SO THERE WON'T BE ANY ADDITIONAL FILINGS, PRESUMABLY, AFTER THE
8 MOTION FOR PRELIMINARY APPROVAL, AND IT'S REALLY ABOUT THE
9 COURT'S CONVENIENCE.

10 THE COURT: WELL, I NEED A MINIMUM OF TWO WEEKS,
11 MINIMUM.

12 MS. DERMODY: SO SEPTEMBER 19?

13 THE COURT: THAT WOULD BE THE LAST POSSIBLE DATE.

14 MS. DERMODY: I THINK THAT SOUNDS ACHIEVABLE.
15 YES? SOUND RIGHT FOR YOU ALL?

16 MS. HENN: YES, YOUR HONOR.

17 THE COURT: I THINK SEPTEMBER 12TH WOULD BE EVEN
18 BETTER, BUT I'LL TAKE THE 19TH.

19 MS. DERMODY: THANK YOU, YOUR HONOR.

20 MR. SAVERI: I THINK WE'D LIKE TO GET IT DONE AS SOON
21 AS WE CAN AND GET THE MOTIONS ON FILE AND GIVE THE COURT AS
22 MUCH TIME AS WE CAN WITH THE PAPERS.

23 THE COURT: UM-HUM. WHY DON'T WE SAY SEPTEMBER 16TH?
24 IS THAT OKAY?

25 MS. HENN, DOES THAT GIVE YOU ENOUGH TIME, OR -- IF YOU WANT

1 UNTIL THE 19TH, THAT'S FINE.

2 MS. HENN: SEPTEMBER 19TH WOULD BE BETTER.

3 THE COURT: OKAY. ALL RIGHT. SO FILE YOUR -- ALL
4 THREE, RIGHT? ALL THREE?

5 MS. HENN: YES.

6 MS. DERMODY: YES.

7 THE COURT: OKAY. SO FILE THE MOTION BY
8 SEPTEMBER 19TH. IT WILL BE HEARD ON OCTOBER THE 3RD.

9 MS. DERMODY: WILL THAT BE 1:30 OR 2:00 O'CLOCK, YOUR
10 HONOR?

11 THE COURT: 1:30.

12 MS. DERMODY: THANK YOU.

13 THE COURT: OKAY. NOW, ARE THERE ANY OTHER
14 NEGOTIATIONS WITH OTHER REMAINING DEFENDANTS? OR NOT?

15 MR. SAVERI: WELL, YOUR HONOR, WE WENT TO A MEDIATION
16 ON WHICH WE REPORTED AND THAT MEDIATION IS NOW CONCLUDED.

17 SO --

18 THE COURT: THERE'S NO FURTHER EFFORTS? I MEAN, I
19 DON'T WANT ANY DETAIL, BUT --

20 MR. SAVERI: I GUESS I WANT TO BE CAREFUL ABOUT THAT.
21 THERE'S REALLY NOTHING ELSE THAT I CAN REPORT RIGHT NOW.

22 THE COURT: OKAY. COULD I SET JUST A SETTLEMENT
23 STATUS REPORT DATE FOR A WEEK FROM NOW? OR --

24 MS. DERMODY: SURE, YOUR HONOR.

25 THE COURT: WHAT MAKES SENSE? I DON'T KNOW IF THE

1 HEARING IS GOING TO MAKE A DIFFERENCE.

2 MR. VAN NEST: YOUR HONOR, THIS IS BOB VAN NEST.

3 I DON'T THINK ANYTHING WILL CHANGE IN A WEEK. I THINK, AS
4 MR. SAVERI PUT IT QUITE CORRECTLY, THE MEDIATION OCCURRED, IT'S
5 OVER, AND NOTHING IS HAPPENING.

6 THE COURT: OKAY.

7 MR. VAN NEST: WITH RESPECT TO THE FOUR REMAINING
8 DEFENDANTS, NOTHING IS GOING TO CHANGE IN THE NEXT WEEK.

9 THE COURT: OKAY. WHAT ABOUT THE NEXT TWO WEEKS,
10 THREE WEEKS?

11 MR. VAN NEST: I THINK IF YOU SET IT OUT A MONTH,
12 THEN FINE, WE'LL SUBMIT A REPORT AND PERHAPS SOMETHING WILL
13 HAPPEN IN THAT PERIOD OF TIME. THAT'S FINE.

14 OR SET IT FOR THE 19TH AND WE'LL FILE SOMETHING ALONG WITH
15 THE OPENING PAPERS.

16 THE COURT: OKAY. LET ME ASK -- I MEAN, OBVIOUSLY
17 YOU MAY NOT KNOW AND YOU HAVE TO CONSULT WITH CLIENTS, BUT DO
18 YOU NEED A RULING ON THE MOTION? OR DO YOU THINK YOU NEED A
19 SUMMARY JUDGMENT RULING? WHAT -- WHAT ADDITIONAL INFORMATION
20 DO YOU THINK THE PARTIES NEED FOR THE REMAINING FOUR
21 DEFENDANTS?

22 MR. SAVERI: YOUR HONOR, JUST SPEAKING FOR MYSELF, I
23 THINK WE CAN --

24 THE COURT: UM-HUM.

25 MR. SAVERI: -- I DON'T THINK WE NEED TO SET IT AT

1 ANY PARTICULAR MILESTONE.

2 THE COURT: UM-HUM.

3 MR. SAVERI: I THINK, FROM THE PLAINTIFFS'
4 PERSPECTIVE, WE'RE READY TO TALK. WE'RE -- IF IT WAS
5 APPROPRIATE TO DO ANOTHER ROUND OF MEDIATION, I THINK WE'D BE
6 WILLING TO DO THAT.

7 THE COURT: UM-HUM.

8 MR. SAVERI: TO ME I THINK IT'S IMPORTANT TO KEEP
9 TALKING ALL THE TIME, SO I'D LIKE TO KEEP THE COMMUNICATION
10 GOING.

11 SO I DON'T -- TO ANSWER YOUR QUESTION DIRECTLY, I DON'T
12 THINK WE SHOULD PUT IT OFF UNTIL SUMMARY JUDGMENT OR RULING ON
13 THE CLASS.

14 I MEAN, OBVIOUSLY EVERYBODY IS INTERESTED TO KNOW WHAT'S
15 GOING TO HAPPEN AS A RESULT OF TODAY OR --

16 THE COURT: UM-HUM.

17 MR. SAVERI: -- DOWN THE ROAD.

18 THE COURT: UM-HUM. LET ME HEAR FROM MR. --

19 MR. VAN NEST: MR. VAN NEST. THANK YOU, YOUR HONOR.

20 THE COURT: OF COURSE I WAS GOING TO SAY THAT.

21 WHAT DO YOU THINK?

22 MR. VAN NEST: OBVIOUSLY CLASS CERT IS A VERY
23 IMPORTANT MILESTONE.

24 THE COURT: UH-HUH.

25 MR. VAN NEST: OBVIOUSLY IF WE GO PAST THAT, SUMMARY

1 JUDGMENT IS AN IMPORTANT MILESTONE.

2 BUT I AGREE WITH MR. SAVERI. THERE'S NOTHING MAGIC ABOUT
3 ANY PARTICULAR TIME. I JUST THINK IT'S UNLIKELY THAT ANYTHING
4 WILL HAPPEN BEFORE YOU RULE ON CLASS CERT.

5 THE COURT: I SEE.

6 MR. VAN NEST: I'M NOT SAYING ANYTHING WOULD HAPPEN
7 AFTER THAT, EITHER, BUT I DON'T THINK ANYTHING WILL HAPPEN
8 UNTIL THEN.

9 THE COURT: UNTIL THERE'S AN ACTUAL RULING?

10 MR. VAN NEST: A RULING OR AN INDICATION FROM YOUR
11 HONOR AS TO WHAT THE RULING WILL BE, YES. I DON'T THINK
12 ANYTHING IS LIKELY TO HAPPEN IN THAT PERIOD.

13 ON THE OTHER HAND, IF MR. SAVERI WANTS TO TALK, THAT'S
14 FINE. WE CAN CERTAINLY SUBMIT A REPORT ON THE 19TH. THAT
15 WON'T TAX ANYBODY.

16 THE COURT: UM-HUM.

17 MR. VAN NEST: AND THEN YOU'LL KNOW.

18 THE COURT: ALL RIGHT. WELL, TELL ME, WITH REGARD
19 TO -- ONCE A RULING IS ISSUED, WHAT'S GOING TO HAPPEN? LET'S
20 SAY I CERTIFY A CLASS. DO YOU WANT TO HAVE ANOTHER ADR SESSION
21 AT THAT POINT?

22 MS. DERMODY: I THINK THAT WOULD BE VERY HELPFUL,
23 YOUR HONOR, ACTUALLY.

24 THE COURT: LET ME SEE IF THE DEFENDANTS ARE WILLING.
25 IS THAT SOMETHING THAT YOU'D BE WILLING TO DO AT THAT

1 POINT?

2 MR. VAN NEST: YOUR HONOR, WE'RE ALWAYS WILLING TO
3 CONSIDER ADR.

4 THE COURT: UM-HUM.

5 MR. VAN NEST: AS I SAID, I THINK IT'S UNLIKELY
6 ANYTHING WOULD HAPPEN BEFORE YOUR RULING ON CLASS CERT.

7 THE COURT: OKAY.

8 MR. VAN NEST: WE OBVIOUSLY FEEL STRONGLY ABOUT THAT
9 ISSUE, AS WE'RE GOING TO BE DISCUSSING IN A MOMENT.

10 SO I DO THINK, THOUGH, THAT ADR BEFORE THAT TIME WOULD NOT
11 BE PRODUCTIVE. I DO AGREE WITH YOU THERE.

12 THE COURT: OKAY. ALL RIGHT. LET'S SAY I DON'T
13 CERTIFY A CLASS. AT THAT POINT?

14 MR. VAN NEST: I THINK THE SAME THING. THAT'S AN
15 IMPORTANT MILESTONE FOR ALL OF US AND --

16 THE COURT: ALL RIGHT.

17 MR. VAN NEST: -- TALKING AFTER THAT WOULD BE --

18 THE COURT: WOULD MAKE SENSE?

19 MR. VAN NEST: -- WORTHWHILE, YES.

20 THE COURT: OKAY. WELL, I WOULD LIKE TO, BECAUSE IT
21 SOUNDS LIKE EITHER WAY THERE'S -- EITHER WAY IT SEEMS LIKE A
22 FURTHER ADR SESSION MIGHT BE HELPFUL AFTER A RULING.

23 SO CAN I GO AHEAD AND REFER YOU NOW AND SET A LONG ENOUGH
24 LEAD TIME THAT YOU'RE ABLE TO MEET THAT DEADLINE?

25 ASSUMING -- LET'S SAY ASSUMING YOU GET A RULING, I DON'T

1 KNOW, IN THE NEXT MONTH. HOW MUCH TIME WOULD YOU NEED FOR ADR?

2 MR. VAN NEST: TO GET READY FOR ADR?

3 THE COURT: AND TO COMPLETE IT, BECAUSE I'LL SET A
4 DEADLINE --

5 MS. DERMODY: THE PROBLEM IS THE MEDIATORS'
6 SCHEDULES, YOUR HONOR. THE VERY GOOD MEDIATORS -- WE WENT
7 THROUGH THIS, ALL OF US, COLLECTIVELY TRYING TO GET DATES.

8 THE COURT: SURE.

9 MS. DERMODY: AND IT WAS UNBELIEVABLE TO GET DATES
10 OVER A FOUR MONTH PERIOD.

11 SO WE MAY ALL HAVE GOOD WILL ABOUT WHEN WE COULD DO IT AND
12 HAVE AVAILABILITY. SO THE SOONER WE KNOW WHAT YOU THINK WILL
13 BE THE SCHEDULE, WHEN THE RULING WILL COME OUT, AND WHEN YOU
14 WOULD LIKE US TO COMPLETE ADR, WE CAN CALL TODAY TO FIND OUT
15 SCHEDULES AND SEE IF WE CAN GET OURSELVES ON A CALENDAR JUST TO
16 HAVE THAT BOOKED.

17 MR. VAN NEST: YOUR HONOR, IF YOU GAVE US 90 DAYS
18 FROM THE RULING, I THINK WE WOULD BE ABLE TO GET IN AND OUT OF
19 THE MEDIATION.

20 THE COURT: UM-HUM.

21 MR. SAVERI: MY CONCERN, THOUGH, YOUR HONOR, IS THAT
22 EVEN IF YOU WERE TO SAY TODAY, "I WANT YOU TO GO TO MEDIATION,"
23 GIVEN THE WAY THE MEDIATORS' CALENDARS GO AND SCHEDULING, IT
24 WOULD BE, I MEAN, 60 OR 90 DAYS BEFORE WE COULD PROBABLY GET IN
25 FRONT OF A MEDIATOR IF THE PAST IS AN INDICATOR.

1 SO I'M A LITTLE WORRIED THAT -- IF YOUR HONOR WANTS US TO
2 GET IN AND DO IT, I THINK WE NEED TO -- IT WOULD BE USEFUL TO
3 HAVE SOME PARAMETERS.

4 I THINK A LOT OF IT DEPENDS ON WHEN YOU RULE AND THAT'S --

5 THE COURT: UM-HUM. WELL, I AM TARGETING GETTING AN
6 ORDER OUT BY THE END OF THIS MONTH OR EARLY SEPTEMBER AT THE
7 LATEST, BUT PREFERABLY THE END OF AUGUST.

8 SO UNDERSTANDING THAT'S THE CASE, I WOULD SUGGEST YOU GO
9 AHEAD AND JUST ASSUME ANY DAY AFTER LABOR DAY IS FAIR GAME FOR
10 A MEDIATION AND JUST GO AHEAD AND SCHEDULE ONE.

11 CAN I THEN SET YOU ON A NOVEMBER 15TH DEADLINE?

12 MR. VAN NEST: SURE.

13 MS. DERMODY: THAT MAKES SENSE, YOUR HONOR.

14 MR. VAN NEST: THAT'S FINE, YOUR HONOR.

15 THE COURT: ALL RIGHT. SO THEN THE REMAINING
16 DEFENDANTS WILL HAVE ANOTHER PRIVATE MEDIATION SESSION TO BE
17 COMPLETED BY NOVEMBER 15TH OF 2013. OKAY.

18 MR. SAVERI: YOUR HONOR --

19 THE COURT: SO YOU'RE SAYING, MR. VAN NEST, THAT YOU
20 DON'T THINK THAT THERE WILL BE ANY FURTHER SETTLEMENTS ABSENT
21 ANOTHER MEDIATION SESSION?

22 MR. VAN NEST: THAT'S RIGHT.

23 THE COURT: SO GETTING AN INTERIM SETTLEMENT STATUS
24 REPORT --

25 MR. VAN NEST: NOT MEANINGFUL.

1 THE COURT: IF YOU WERE GOING TO RESOLVE THE CASE, I
2 WOULDN'T HAVE TO ISSUE THE ORDER. BUT YOU KNOW THAT'S NOT
3 GOING TO HAPPEN?

4 MS. DERMODY: YOU KNOW, YOUR HONOR, WE'LL LET YOU
5 KNOW IF SOMETHING ELSE --

6 MR. VAN NEST: IT'S NOT MEANINGFUL.

7 THE COURT: ALL RIGHT.

8 MR. VAN NEST: IF YOU SET THE DEADLINE, WE'LL
9 COMPLETE IT BY THEN.

10 MR. SAVERI: I WOULD HOPE, YOUR HONOR, THAT WE -- YOU
11 KNOW, WE WENT THROUGH MEDIATION SESSIONS, WE ESSENTIALLY
12 ACCOMPLISHED THE SETTLEMENTS WE DID WITH BILATERAL NEGOTIATIONS
13 BETWEEN THE PLAINTIFFS AND THE DEFENDANTS.

14 SO I WOULD HOPE THAT WE'D BE ABLE TO CONTINUE THAT AND NOT
15 JUST WAIT FOR THE MEDIATION SESSION TO TRY TO NARROW THIS.

16 THE COURT: PLEASE. I MEAN, SAVE YOURSELVES THE
17 MONEY --

18 MR. VAN NEST: ABSOLUTELY.

19 THE COURT: -- AND JUST DO IT YOURSELVES. OKAY,
20 YEAH, PLEASE.

21 MR. SAVERI: AND, YOUR HONOR, I GUESS THE OTHER THING
22 I WOULD SAY IS THAT FROM MY PERSPECTIVE, I THINK IT IS -- IT IS
23 USEFUL TO HAVE DECISION MAKERS TO BE PRESENT AND INVOLVED AT
24 THE MEDIATION, AND I THINK IF WE'RE GOING TO DO THIS SERIOUSLY
25 THE NEXT TIME, FROM MY PERSPECTIVE, IT WOULD BE USEFUL TO HAVE

1 A COMMITMENT FROM ALL SIDES THAT PEOPLE WITH AUTHORITY AND
2 DECISION MAKING POWER ARE GOING TO BE ACTIVE PARTICIPANTS ON
3 THE DAY OF THE MEDIATION.

4 THE COURT: HOW WERE THEY AVAILABLE LAST TIME? JUST
5 BY PHONE, OR --

6 MR. SAVERI: FROM WHAT I UNDERSTAND, AND THE OTHER
7 SIDE CAN SPEAK TO THIS, THERE WERE IN-HOUSE COUNSEL REPRESENTED
8 AT THE MEDIATION, BUT THAT WAS -- THAT WAS IT.

9 THE COURT: BUT THEY MUST HAVE HAD SETTLEMENT
10 AUTHORITY UP TO A CERTAIN NUMBER.

11 MR. SAVERI: I DON'T KNOW ANYTHING -- I DON'T KNOW
12 ANYTHING ABOUT THAT.

13 MR. VAN NEST: WE HAD PEOPLE THERE, YOUR HONOR, WITH
14 SETTLEMENT AUTHORITY, AND WE WILL AGAIN, AND I UNDERSTAND
15 THAT'S THE BASELINE, OF COURSE.

16 BUT AS MR. SAVERI SAYS -- AND I UNDERSTAND WHAT HE SAYS IS
17 TRUE -- SOME OF THE NEGOTIATIONS OCCURRED JUST BETWEEN THE
18 LAWYERS AND THAT'S WHAT ULTIMATELY GOT IT DONE --

19 THE COURT: UM-HUM.

20 MR. VAN NEST: -- FOR THE ONES THAT SETTLED.

21 THE COURT: UM-HUM.

22 MR. VAN NEST: SO UNDERSTOOD.

23 THE COURT: OKAY. ALL RIGHT. NOW, LET ME ASK, FOR
24 ANTITRUST IMPACT, DO WE NEED TO CONSIDER NOW THE ALLEGATIONS
25 THAT YOU MADE AGAINST LUCASFILM, PIXAR, AND ADOBE -- AND

1 INTUIT? DO WE STILL NEED TO -- I KNOW BOTH SIDES BELIEVE THAT
2 THERE'S NO IMPACT FROM THE THREE DEFENDANTS SETTLING, BUT TELL
3 ME WHAT IS THERE, IF ANY, IMPACT ON WHETHER WE STILL LOOK AT
4 THE DEPOSITION TESTIMONY AND THE EVIDENCE OF THOSE THREE
5 COMPANIES AS PART OF THE ANALYSIS IN THIS MOTION.

6 MR. VAN NEST: I THINK, YOUR HONOR --

7 THE COURT: WHAT DO WE DO WITH THAT?

8 MR. VAN NEST: I THINK THEY ESSENTIALLY DROP OUT.

9 BUT THEY'RE A SMALL PART OF THE GROUP. I MEAN, THE THREE
10 TOGETHER EMPLOY LESS THAN 8 PERCENT OF THE EMPLOYEES IN THE
11 PROPOSED CLASS.

12 SO I THINK THE REAL FOCUS NOW IS ON THE REMAINING
13 DEFENDANTS AND THE -- AND WHATEVER AGREEMENTS THEY'RE ABLE TO
14 PROVE AS BETWEEN AND AMONG THEM.

15 BUT EITHER WAY, I THINK BOTH OF US SAID IN THE STATUS
16 CONFERENCE STATEMENTS, THE SETTLEMENTS DON'T CHANGE ANYTHING,
17 IN PART BECAUSE THE THREE SETTLING DEFENDANTS WERE A VERY SMALL
18 PART OF THIS TO BEGIN WITH. AS I SAID, LESS THAN 8 PERCENT OF
19 CLASS MEMBERS ARE EMPLOYED BY ALL THREE COMBINED.

20 SO THE LARGEST PART OF THE CASE IS STILL BEFORE YOUR HONOR
21 AND THE CONDUCT THAT I THINK YOU'LL BE FOCUSSING ON IS THE
22 CONDUCT OF THE FOUR REMAINING DEFENDANTS, NOT THOSE THAT HAVE
23 SETTLED OUT.

24 THE COURT: BUT WHY WOULDN'T THE COMMENTS OF
25 MR. CATMULL AND MR. LUCAS STILL BE RELEVANT TO --

1 MR. VAN NEST: THEY MIGHT HAVE SOME --

2 THE COURT: -- THE ANTITRUST CONSPIRACY, HOW THE
3 AGREEMENTS WERE ENFORCED, HOW THEY WERE IMPLEMENTED?

4 MR. VAN NEST: THEY MIGHT HAVE SOME LIMITED
5 RELEVANCE, YOUR HONOR.

6 BUT ESSENTIALLY YOU'RE LOOKING NOW -- BECAUSE THE NATURE OF
7 THE AGREEMENTS THAT THEY'VE ALLEGED ARE BILATERAL BETWEEN AND
8 AMONG INDIVIDUAL PAIRS OF DEFENDANTS, I THINK THAT EVIDENCE IS
9 GOING TO BE LARGEY RELEVANT BECAUSE THE FOCUS WILL BE ON WHAT,
10 IF ANY, IMPACT WAS THERE FROM THE BILATERAL AGREEMENTS THAT ARE
11 BEING LITIGATED NOW AS BETWEEN THE OTHER FOUR REMAINING
12 DEFENDANTS.

13 SO, AGAIN, I DON'T WANT TO SAY ABSOLUTELY NO RELEVANCE, BUT
14 VERY LIMITED.

15 THE COURT: OKAY.

16 MR. SAVERI: YOUR HONOR --

17 THE COURT: LET ME HEAR FROM THE PLAINTIFFS. YOU
18 AGREE THAT YOU'RE NOT ADVOCATING AN OVERARCHING CONSPIRACY
19 ANYMORE, IT'S JUST BILATERAL AGREEMENTS AND --

20 MR. SAVERI: NO, YOUR HONOR. I DON'T THINK THAT THE
21 FACT THAT WE'VE -- THAT WE'VE -- NOTHING HAS REALLY CHANGED IN
22 TERMS OF OUR THEORY OF THE CASE. WE ALLEGE -- AND MR. GLACKIN
23 IS GOING TO HANDLE THE SUBSTANCE OF THE ARGUMENT, BUT LET ME
24 JUST SAY THIS.

25 I THINK THAT THE -- AS YOU SAID, THE EVIDENCE OF THE

1 SETTLING DEFENDANTS WITH RESPECT TO THE AGREEMENTS, THE NATURE
2 AND THE SCOPE OF THE AGREEMENTS, IS STILL GOING TO BE RELEVANT
3 IN THIS CASE.

4 AND TO THE EXTENT THAT THERE IS OTHER EVIDENCE THAT HAS TO
5 DO WITH THE BUSINESS PRACTICES OF THOSE COMPANIES THAT WE RELY
6 ON TO SHOW A CLASS-WIDE IMPACT, THE FACT THAT THOSE DEFENDANTS
7 HAVE SETTLED DOESN'T CHANGE THAT FACT.

8 REMEMBER THAT THIS REMAINS A, AN ANTITRUST CLAIM AND ALL
9 THE PARTICIPANTS IN THE CONSPIRACY ARE, AS A MATTER OF LAW,
10 JOINTLY AND SEVERALLY LIABLE.

11 AND SO TO THE EXTENT THAT WE PROVE AN UNDERSTANDING, A
12 COMMON COURSE OF CONDUCT THAT INVOLVES ALL OF THESE COMPANIES,
13 I MEAN, THAT EVIDENCE IS RELEVANT.

14 THE COURT: WHAT IS THE BREAKDOWN OF THE, WHAT IS IT,
15 60,000 THAT YOU'RE ALLEGING ARE IN YOUR TECHNICAL EMPLOYEE
16 CLASS? WHAT'S THE BREAKDOWN AMONGST THE VARIOUS DEFENDANTS,
17 INCLUDING THE ONES WHO ARE NOW OUT OF THE CASE?

18 MR. GLACKIN: WOULD YOU LIKE TO KNOW THE BREAKDOWN ON
19 NUMBER OF CLASS MEMBERS OR -- WELL, I CAN TELL YOU WHERE THAT
20 INFORMATION IS IN THE RECORD ACTUALLY IF THAT WOULD BE HELPFUL.

21 THE COURT: OKAY. THAT'S FINE.

22 MR. GLACKIN: IF YOU GO TO THE OCTOBER 12, 2012
23 REPORT OF DR. LEAMER AND YOU GO TO PAGE 23, WHICH IS BETWEEN
24 PARAGRAPHS 54 AND 55, THERE ARE TWO TABLES THERE THAT -- ONE OF
25 THEM IS FOR THE ALL SALARIED CLASS AND ONE OF THEM IS FOR THE

1 TECHNICAL CLASS, WHICH IS THE SAME CLASS THAT WE'RE NOW SEEKING
2 TO CERTIFY.

3 THE COURT: WHICH REPORT? I HAVE THE MAY 10TH,
4 2013 --

5 MR. GLACKIN: THIS IS LAST YEAR.

6 THE COURT: -- AND JULY 12TH.

7 OH, I DON'T HAVE THAT.

8 MR. GLACKIN: RIGHT. BUT IF YOU WERE TO -- I'D BE
9 HAPPY TO HAND YOU MY PAGE IF IT'S HELPFUL. I SHOWED THIS TO
10 MR. VAN NEST.

11 THE COURT: CAN YOU JUST GIVE ME THE BALLPARKS?

12 MR. GLACKIN: SURE. WELL, BY NUMBER OF EMPLOYEES, I
13 CAN TELL YOU THAT ADOBE IS 3,601; APPLE IS 6,835.

14 THE COURT: 6,000 WHAT?

15 MR. GLACKIN: 835.

16 THE COURT: OKAY. THANK YOU.

17 MR. GLACKIN: GOOGLE IS 7,854.

18 THE COURT: OKAY.

19 MR. GLACKIN: INTEL IS 36,643.

20 THE COURT: OKAY.

21 MR. GLACKIN: INTUIT IS 3,236.

22 THE COURT: OKAY.

23 MR. GLACKIN: LUCAS IS 522; PIXAR IS 859.

24 THE COURT: ALL RIGHT. WHAT ABOUT THE -- HOW MANY
25 JOBS -- WELL, I GUESS THAT'S IN THE CHART THAT YOU PROVIDED,

1 THE VARIOUS JOB TITLES FOR EACH OF THOSE.

2 MR. VAN NEST: 2400, YOUR HONOR --

3 MR. GLACKIN: 24 --

4 MR. VAN NEST: -- IS THE TOTAL.

5 THE COURT: NOW, LET ME ASK, WITH REGARD TO

6 MR. HARIHARAN -- DID I PRONOUNCE THAT CORRECTLY?

7 MR. GLACKIN: CORRECT.

8 THE COURT: OKAY. HE DID NOT WORK FOR A DEFENDANT
9 WHO IS LEFT IN THIS CASE, SO WHY SHOULD HE STILL CONTINUE TO
10 SERVE AS A CLASS REPRESENTATIVE?

11 MR. GLACKIN: WELL, AS MR. SAVERI SAID, YOUR HONOR,
12 WE'RE ALLEGING A SINGLE VIOLATION OF THE SHERMAN ACT, A SINGLE
13 CONSPIRACY, COMBINATION, AGREEMENT, UNDERSTANDING IN RESTRAINT
14 OF TRADE.

15 AND EVEN -- THE EMPLOYEES WHO WERE AT THE -- THE PEOPLE WHO
16 WORKED FOR THE SETTLED COMPANIES DURING THE CLASS PERIOD STILL
17 HAVE ACTIVE CLAIMS AGAINST THE OTHER MEMBERS OF THE CONSPIRACY
18 BECAUSE, AS MR. SAVERI SAID, UNDER COPIOUS PRECEDENT, INCLUDING
19 TEXAS VERSUS RADCLIFF, WHICH IS THE SIGNATURE UNITED STATES
20 SUPREME COURT CASE ON JOINT AND SEVERAL LIABILITY, AND UNDER
21 THE SHERMAN ACT, ALL OF THE MEMBERS OF THE COMBINATION
22 CONSPIRACY UNDERSTANDING ARE LIABLE FOR ONE ANOTHER'S CONDUCT,
23 OR WRONGDOING, I SHOULD SAY.

24 SO MR. HARIHARAN STILL HAS AN ACTIVE CLAIM AGAINST THE
25 OTHER FOUR DEFENDANTS, JUST AS ALL THE OTHER NAMED CLASS

1 REPRESENTATIVES HAVE ACTIVE CLAIMS AGAINST THOSE FOUR REMAINING
2 DEFENDANTS.

3 THE COURT: SO YOU'RE NOT EVEN LIMITING THAT TO ANY
4 OF THE DEFENDANTS WHO HAD A SPECIFIC BILATERAL AGREEMENT WITH
5 HIS EMPLOYER, LUCASFILM?

6 MR. GLACKIN: CORRECT, BECAUSE WE'RE ALLEGING A
7 SINGLE, A SINGLE CONSPIRACY AND RESTRAINT OF TRADE.

8 AND THE CLASS IS -- THE SETTLEMENT CLASS IS IDENTICAL TO
9 THE PROPOSED TECHNICAL CLASS. IT INCLUDES MEMBERS OF ALL OF
10 THESE COMPANIES.

11 SO, FOR EXAMPLE, YOU KNOW, INTEL EMPLOYEES ARE MEMBERS OF
12 THE SETTLEMENT -- OF THE CLASS THAT WILL BE PROPOSED FOR THE
13 SETTLEMENT, AND THERE ARE GOING TO BE CLASS MEMBERS WHO RELEASE
14 THEIR CLAIMS AGAINST INTUIT, PIXAR, AND LUCASFILM.

15 SO WHEN WE FILE THE PAPERS, THERE WON'T BE ANY DIFFERENCE
16 BETWEEN THE CLASSES, AND THAT I THINK WE PUT FORWARD IN THE
17 UPDATE YOU REQUESTED.

18 THE COURT: SO LET ME HEAR FROM MR. VAN NEST. WHAT'S
19 YOUR POSITION ON WHETHER MR. HARIHARAN CAN CONTINUE TO SERVE AS
20 A CLASS REP?

21 MR. VAN NEST: I THINK YOUR HONOR IS RIGHT. HE
22 DOESN'T REALLY HAVE A ROLE AT THIS POINT.

23 IT'S NOTABLE THAT REALLY NONE OF THE CLASS REPS ARE FROM
24 JOB TITLES THAT MAKE UP THE VAST MAJORITY OF JOB TITLES THAT
25 ARE NOW BEING PROPOSED.

1 THESE 2400 JOB TITLES, TWO-THIRDS OF THE CLASS WORK AT
2 INTEL. OF THOSE, ROUGHLY HALF WORK IN SEMICONDUCTOR
3 MANUFACTURING, WHICH IS UNIQUE TO THEM.

4 THERE ARE JOB TITLES ALL OVER THE LOT THAT HAVE NOTHING TO
5 DO WITH THE JOB TITLES OF THE CLASS REPS, WHO ARE ESSENTIALLY,
6 MOST OF THEM, SOFTWARE ENGINEERS. SO THEY DON'T REALLY HAVE
7 TYPICAL REPRESENTATIVES TO BEGIN WITH.

8 HE'S IN A UNIQUE SITUATION SINCE HE DOESN'T WORK FOR
9 ANYBODY THAT'S GOING TO BE IN THE CASE.

10 AND, OF COURSE, LUCASFILM AND PIXAR ARE KIND OF IN A
11 SEPARATE INDUSTRY, TOO. THEY'RE IN THIS NORTHERN CALIFORNIA
12 FILM INDUSTRY, WHICH NOBODY ELSE PARTICIPATES IN, SO THEY ARE
13 UNIQUE.

14 HE IS UNIQUE. THEY'RE NO LONGER IN THE CASE. THEY HAVE
15 FOUR OTHER CLASS REPS.

16 FRANKLY, I DON'T THINK ANY OF THEM ARE PARTICULARLY TYPICAL
17 OF SOMETHING WHERE YOU'RE TRYING TO CERTIFY 2400 JOB TITLES,
18 BUT CERTAINLY HE'S PROBABLY AT THE BOTTOM OF THE LIST AND
19 THERE'S NO LONGER ANY REASON FOR HIM TO SERVE.

20 THE COURT: DID ANY OF THE NAMED PLAINTIFFS WORK FOR
21 APPLE OR GOOGLE?

22 MR. GLACKIN: I BELIEVE THE ANSWER IS NO, YOUR HONOR.

23 THE COURT: OKAY.

24 MR. GLACKIN: IF I -- SORRY.

25 THE COURT: SO WHAT'S THE THEORY OF, OF THE NAMED

1 PLAINTIFFS REPRESENTING EMPLOYEES AT THOSE TWO COMPANIES?

2 MR. GLACKIN: WELL, THERE'S NO -- I MEAN, SAYING THAT
3 IT WAS NECESSARY TO HAVE AN EMPLOYEE FROM EACH COMPANY IN
4 THE -- AS A CLASS REPRESENTATIVE WOULD BE AKIN TO SAYING THAT
5 YOU COULD NOT CERTIFY A CLASS IN A PRICE FIXING CONSPIRACY CASE
6 UNLESS YOU HAD SOMEBODY WHO HAD BOUGHT FROM EVERY DEFENDANT.

7 AND IF YOU TOOK MR. VAN NEST'S ARGUMENT AND TRANSLATED IT
8 INTO THAT CONTEXT, WITH WHICH WE'RE ALL VERY FAMILIAR, THE
9 ARGUMENT WOULD BE THAT IF YOU BOUGHT FROM A SETTLED DEFENDANT,
10 YOU ARE NO LONGER AN APPROPRIATE CLASS REPRESENTATIVE IN A
11 GARDEN VARIETY PRICE FIXING CONSPIRACY CASE.

12 AND I CAN TELL YOU THAT HAVING -- I MEAN, I'M NOT -- I'LL
13 SIMPLY SAY I AM NOT AWARE OF THAT EVER HAPPENING. I'M NOT
14 AWARE OF ANYONE EVER MAKING THAT CONTENTION. I'M NOT AWARE OF
15 ANY COURT EVER COMING TO THAT CONCLUSION.

16 BECAUSE EVEN IF YOU -- I MEAN, WE HAD THIS COME UP SIMPLY
17 12 MONTHS AGO. I MEAN, THERE WERE -- WHEN WE TRIED THE LCDS
18 CASE, WE HAD A NUMBER OF CLASS REPRESENTATIVES. THE TRIAL WAS
19 AGAINST TOSHIBA. EVERY OTHER DEFENDANT SETTLED. BUT THE VAST
20 MAJORITY OF OUR CLASS REPRESENTATIVES DID NOT BUY FROM TOSHIBA
21 BECAUSE TOSHIBA WAS A VERY SMALL MANUFACTURER IN THAT MARKET.

22 SO IT'S TOTALLY NORMAL TO HAVE -- TO NOT HAVE COMPLETE
23 COVERAGE OF EVERY MEMBER OF THE CONSPIRACY IN TERMS OF
24 TRANSACTIONS, AND IT'S TOTALLY NORMAL FOR THOSE WHO BOUGHT FROM
25 SETTLED DEFENDANTS TO STAY IN THE CASE BECAUSE MR. HARIHARAN,

1 HE'S STILL JUST IN THE SAME POSITION AS EVERY OTHER CLASS
2 MEMBER. HE STILL HAS A CLAIM AGAINST THE OTHER FOUR MEMBERS
3 WHO HAVE NOT SETTLED.

4 MR. VAN NEST: YOUR HONOR, THERE'S REALLY A MORE
5 FUNDAMENTAL PROBLEM THAN THIS, AND THAT IS THERE IS NO CASE
6 THAT HAS CERTIFIED A CLASS THIS BROAD AND THIS DIVERSE IN A
7 WAGE SUPPRESSION CONTEXT.

8 WE HAVE, AMONG THE EVIDENCE HERE -- AND I HAVE AN APPENDIX
9 I CAN HAND UP -- 2400 JOB TITLES, 60,000 EMPLOYEES. THEY COVER
10 A WIDE RANGE OF AREAS. MORE THAN HALF OF THEM WORK OUTSIDE OF
11 SILICON VALLEY. IT IS AN ENORMOUS CLASS AND ENORMOUSLY
12 DISPARATE.

13 IF YOU LOOK AT THE JOB TITLES THAT THEY ARE CLAIMING ARE
14 LINKED TOGETHER, IT'S EVERYTHING FROM A MASK DESIGNER TO A
15 SEMICONDUCTOR MANUFACTURER TO AN ARTIST TO A SOFTWARE ENGINEER
16 TO A CHEMICAL ENGINEER. IT'S ENORMOUS AND NONE OF THESE
17 PEOPLE --

18 THE COURT: I'M SORRY TO INTERRUPT YOU.

19 MR. VAN NEST: YEAH.

20 THE COURT: BUT THE COMPANIES THEMSELVES IDENTIFIED
21 WHO THEY BELIEVE THEIR PEERS WERE FOR TALENT AND THEY DID
22 BASICALLY IDENTIFY EACH OTHER AS PEERS. I MEAN, I HAVE
23 SPECIFIC EXHIBIT NUMBERS IF YOU WANT TO GO THERE.

24 BUT THEY DID DO SOME ANALYSIS OF WHO WOULD BE COMPETING FOR
25 THE SAME TALENT AND THEY WOULD SAY THE OTHER COMPANIES.

1 SO I HEAR WHAT YOU'RE SAYING, YOU KNOW, THE WAFER MASK
2 DESIGNER IS DIFFERENT THAN, YOU KNOW, SOMEONE DESIGNING APPS
3 SOMEWHERE ELSE.

4 BUT EFFECTIVELY --

5 MR. VAN NEST: NOT JUST THAT, YOUR HONOR, BUT I
6 THINK, AS YOU NOTED LAST TIME AND IN YOUR ORDER, OBVIOUSLY SOME
7 CATEGORIES OF EMPLOYEES WERE MORE IMPORTANT THAN OTHERS, OR
8 MORE -- PEOPLE WERE MORE CONCERNED ABOUT SOME CATEGORIES THAN
9 OTHERS, OBVIOUSLY.

10 AND HERE WHERE ONE OF THE COMPANIES WITH TWO-THIRDS OF THE
11 CLASS IS PRIMARILY ENGAGED IN AN AREA THAT NO OTHER DEFENDANT
12 IS ENGAGED IN -- YOU KNOW, INTEL HAS -- THERE'S ONLY A CLAIM OF
13 ONE BILATERAL AGREEMENT BETWEEN INTEL AND GOOGLE, NOT A LOT OF
14 AUDITORS.

15 AND EVEN THERE, THERE ARE SO MANY -- THIS IS WHAT YOU SAID
16 LAST TIME. ONE OF YOUR TWO BIG CONCERN WAS, IS THE CLASS SO
17 BIG AND SO LARGE AND SO DIVERSE THAT THERE ARE PEOPLE IN IT
18 THAT WEREN'T IMPACTED AND THAT SUFFERED NO INJURY?

19 AND OBVIOUSLY WHERE YOU HAVE MORE THAN HALF OF THE FOLKS
20 OUTSIDE OF SILICON VALLEY, SUBJECT TO DIFFERENT PAY STRUCTURE
21 ALTOGETHER, AND WHERE TWO-THIRDS OF THEM WORK FOR A COMPANY
22 THAT DOES SOMETHING UNIQUE, WE'VE GOT AN ENORMOUS PROBLEM.

23 NO OTHER CASE, NOT WEISBERG, NOT REED, NOT FLEISHMAN, NO
24 OTHER CASE HAS CERTIFIED A CLASS ANYWHERE NEAR THIS SIZE IN A
25 WAGE SUPPRESSION CASE BECAUSE THEY'RE LOOKING AT, HEY, WHAT,

1 WHAT POSITIONS ARE COMPARABLE? HOW MUCH HOMOGENEITY IS THERE?
2 HOW ARE THEY GOING TO BE ABLE TO SHOW IMPACT ACROSS THE WHOLE
3 GROUP?

4 IT MAKES NO LOGICAL SENSE THAT THE ABSENCE OF A CALL TO AN
5 ENGINEER IN SILICON VALLEY WOULD AFFECT A MASK DESIGNER IN
6 MASSACHUSETTS OR ARIZONA OR NEW MEXICO, AND THAT'S WHAT
7 THEY'RE -- THEY'RE HERE CLAIMING THAT THESE 2400 JOB TITLES ARE
8 ALL SOMEHOW LINKED TOGETHER. THERE'S 800 OF THEM ALONE AT
9 INTEL, ALMOST 400 OF THEM AT GOOGLE, 350 OF THEM AT APPLE, AND
10 THEY'RE SAYING THIS IS ALL LINKED TOGETHER.

11 IN THE OTHER CASES WHERE THIS HAS COME UP, THE CLAIM HAS
12 BEEN THAT ONE --

13 THE COURT: BUT THERE IS --

14 MR. VAN NEST: -- JOB TITLE --

15 THE COURT: -- EVIDENCE FOR EACH OF THE DEFENDANTS
16 THAT THEY HAD THESE JOB FAMILIES, THAT THEY HAD THESE PAY
17 RANGES THAT ARE SIMILAR TO CRIMINAL SENTENCING, YOU HAD THE
18 LOW, THE MEDIUM, AND THE HIGH.

19 (LAUGHTER.)

20 THE COURT: AND THAT IN SOME INSTANCES, IF YOU WANTED
21 TO GO OUTSIDE THAT RANGE, YOU HAD TO GET AN EXTRA LEVEL OF
22 APPROVAL; THAT THEY WERE ALWAYS AWARE, WHEN THEY WERE BRINGING
23 A LATERAL PERSON IN, WHERE EVERYONE ELSE STOOD SO THERE
24 WOULDN'T BE AN ISSUE OF DISPARITY.

25 SO I -- LET ME ASK YOU A QUESTION. AT THE LAST HEARING THE

1 DEFENDANTS' COUNSEL SAID THAT -- I'LL JUST QUOTE IT -- "AND I
2 ADMIT AT THE START, WE ARE NOT SAYING THAT NOBODY WAS
3 IMPACTED."

4 SO LET ME ASK -- I JUST WANT TO FOLLOW-UP. HOW MANY WERE
5 IMPACTED? WHO WAS IMPACTED?

6 MR. VAN NEST: WELL, I DON'T THINK THERE'S ANY WAY --

7 THE COURT: UM-HUM.

8 MR. VAN NEST: -- TO KNOW THAT.

9 BUT WHAT WE DO KNOW --

10 THE COURT: WELL, HOW CAN YOU SAY THAT NO ONE WAS
11 IMPACTED?

12 MR. VAN NEST: I'M NOT SAYING THAT NO ONE WAS
13 IMPACTED.

14 THE COURT: OKAY.

15 MR. VAN NEST: BUT FOR THE PURPOSE OF -- WHAT WE
16 UNDERSTOOD TO BE YOUR HONOR'S CONCERN WAS, CAN THE PLAINTIFF
17 SHOW, IN ORDER TO ESTABLISH CLASS-WIDE INJURY --

18 THE COURT: LET ME ASK YOU A QUESTION. I BELIEVE
19 THAT WAS MR. MITTELSTAEDT AT THE TIME. WHEN HE SAYS, "WE'RE
20 NOT SAYING THAT NOBODY WAS IMPACTED," WHAT DID THAT MEAN?

21 MR. VAN NEST: I THINK WHAT HE MEANT WAS FOR THE
22 PURPOSES OF CLASS CERT, WE'RE NOT TAKING THE POSITION THAT THEY
23 CAN'T SHOW ANY IMPACT.

24 THE ISSUE IS, CAN THEY SHOW IMPACT TO ALL OR NEARLY ALL OF
25 THE MEMBERS OF THE CLASS?

1 I THINK THAT'S ALL MR. MITTELSTAEDT MEANT, AND THAT'S ALL I
2 MEAN, TOO. WE'RE NOT GOING TO DEBATE TODAY, I DON'T THINK IT'S
3 PROPER, HOW MANY. I'M NOT SURE THEY'RE GOING TO PROVE MUCH OF
4 ANYTHING.

5 THE COURT: WELL, HOW MUCH IS REQUIRED? IN ORDER TO
6 CERTIFY CLASS, THEY DON'T HAVE TO SHOW THAT 60,000 WAS ENOUGH.
7 40 IS USUALLY ENOUGH. SOMETIMES 20 MIGHT BE ENOUGH. WHAT'S
8 THE NUMBER THAT THEY'RE -- SEPARATE FROM WHETHER THEY'VE SHOWN
9 IMPACT OR NOT, WHAT IS THE MINIMUM LEVEL OF SHOWING IN TERMS OF
10 PEOPLE THAT THEY NEED TO MAKE IN ORDER TO GET CERTIFIED?

11 MR. VAN NEST: THEY NEED TO SHOW THAT NEARLY ALL --
12 IF THEY WANT TO PROCEED AS A CLASS --

13 THE COURT: OKAY.

14 MR. VAN NEST: -- THEY NEED TO SHOW -- AND YOU
15 RECOGNIZED THIS AT PAGE 46 OF YOUR ORDER LAST TIME -- THEY NEED
16 TO SHOW THAT THE WAGE STRUCTURES WERE SO, SO RIGID THAT THEY
17 WOULD HAVE AFFECTED ALL OR NEARLY ALL MEMBERS OF THE CLASS.

18 THAT'S EXACTLY WHAT YOU SAID AND THAT'S EXACTLY RIGHT.
19 THESE CASES ALL SAY, IF WE'RE GOING TO PROCEED AS A CLASS,
20 YOU'VE GOT TO SHOW THAT CLASS-WIDE IMPACT, AND CLASS-WIDE MEANS
21 ALL OR NEARLY ALL. NOT EVERYBODY. NOT 60,000, CERTAINLY.

22 BUT IT'S -- IT'S GOT TO BE A SITUATION WHERE THEY PROVE, IN
23 ONE TRIAL, THAT VIRTUALLY ALL MEMBERS OF THE CLASS WERE
24 IMPACTED.

25 AND THEN YOU GO ON, IF THEY PREVAIL, TO TRY TO ESTABLISH

1 DAMAGES.

2 SO WHAT WE'VE DONE HERE IS THEY'VE COME IN, AND YOU PUT
3 THEM TO IT LAST TIME, YOU SAID, "CAN YOU SHOW ME THAT THE
4 STRUCTURES FOR WAGES AT THE COMPANIES WERE SO RIGID THAT AN
5 IMPACT ON SOME PEOPLE WOULD HAVE PROPAGATED TO ALL OR NEARLY
6 ALL?"

7 AND THEY ABSOLUTELY HAVE FAILED TO DO THAT. DR. LEAMER
8 SAYS HE CAN'T REACH THAT CONCLUSION. HE FLAT OUT ADMITTED IN
9 DEPOSITION -- AND I HAVE THE CITATION, YOUR HONOR -- THAT "I
10 CAN'T TELL YOU THAT ADOBE'S STRUCTURE WAS SO RIGID THAT IMPACT
11 TO SOME WOULD, WOULD FLOW DOWN TO IMPACT TO OTHERS." AND HE
12 SAYS, "I DON'T BELIEVE THAT IT WOULD."

13 NOW, YOU HAVE, FROM DR. MURPHY, YOUR HONOR, THE --

14 THE COURT: LET ME ASK YOU A QUESTION. LET'S SAY
15 THIS PROCEEDS ALONG INDIVIDUAL CLAIMS. HOW IS THAT GOING TO
16 WORK?

17 MR. VAN NEST: I WOULD CALL THAT A MASS ACTION.

18 THE COURT: A CLASS --

19 MR. VAN NEST: NO, I WOULDN'T. ACTUALLY, I THINK
20 THAT IS AN EASIER, MORE EFFICIENT WAY TO HANDLE THIS. WE WILL
21 CALL THAT A MASS ACTION, NOT A CLASS ACTION.

22 IF THERE ARE PEOPLE, AND CERTAINLY THE CLASS REPS WOULD BE
23 AMONG THEM, WHO BELIEVE THEY WERE INJURED, THEY WOULD COME IN,
24 THEY WOULD PRESENT THEIR COMPLAINT, MAYBE WE'D HAVE 200 OF
25 THEM, MAYBE WE'D HAVE 300 OF THEM, BUT WHAT WE WOULD DO IS WE

1 WOULD NEGOTIATE A REPRESENTATIVE FEW OF THOSE TO TRY THE FIRST
2 COUPLE OF CASES, OR THE FIRST CASE, AND SEE WHERE WE COME OUT
3 AND TRY TO BENCHMARK WHETHER THEY CAN ESTABLISH LIABILITY IN
4 THE FIRST PLACE, AND IF THEY CAN, WHAT ARE THE RANGES OF
5 DAMAGES.

6 NOW, REMEMBER, WE'RE TALKING --

7 THE COURT: SO YOU'RE GOING TO HAVE BELLWETHER TRIALS
8 WHICH ARE THEN GOING TO EXTRAPOLATE THE CLASS AND SETTLE ON A
9 CLASS SIZE. THAT'S WHAT'S GOING TO HAPPEN?

10 MR. VAN NEST: HAPPENS ALL THE TIME.

11 AND IN THIS CASE, I'D SAY, YOUR HONOR, IT'S ABSOLUTELY
12 APPROPRIATE.

13 WHY? BECAUSE WHAT THEY'RE ALLEGING IS A BUNCH OF BILATERAL
14 AGREEMENTS. THEY CAN TALK ABOUT OVERARCHING CONSPIRACY, BUT
15 THERE'S ONLY EVIDENCE SO FAR OF THESE BILATERAL AGREEMENTS
16 BETWEEN COMPANIES.

17 THE COURT: SO YOU'RE SAYING 200 BELLWETHER TRIALS
18 AND FROM THERE WE'LL EXTRAPOLATE TO 60,000?

19 MR. VAN NEST: NO, NO, NO. I'M SAYING IF WE HAD 200
20 PEOPLE MAKING CLAIMS -- I DON'T KNOW HOW MANY PEOPLE ACTUALLY
21 FEEL THEY HAVE A CLAIM. I'M SAYING IF WE HAVE 200 OR 300
22 PLAINTIFFS, WE WOULD CONDUCT A FEW, ONE, TWO, OR THREE
23 BELLWETHER TRIALS, NOT A LOT, AND THAT HAPPENS ALL THE TIME.

24 AND HERE IT'S APPROPRIATE, YOUR HONOR, BECAUSE THEY FAILED
25 TO SHOW, AFTER YOU GAVE THEM A CLEAR ROADMAP, THAT THE SALARY

1 STRUCTURES ARE SO RIGID --

2 THE COURT: SO LET ME ASK YOU, AFTER THE THREE
3 BELLWETHER TRIALS, THEN WHAT'S GOING TO HAPPEN? YOU'RE GOING
4 TO ASSUME, OKAY, THIS 1,000, 2,000 GROUP OF CLASS MEMBERS HAVE
5 CLAIMS THAT ARE SOMEWHAT SIMILAR TO BELLWETHER TRIAL NUMBER TWO
6 AND SO, THEREFORE, THEIR DAMAGES SHOULD ROUGHLY APPROXIMATE --

7 MR. VAN NEST: THAT'S RIGHT.

8 THE COURT: -- WHATEVER THE FINDING WAS IN BELLWETHER
9 TRIAL NUMBER TWO?

10 MR. VAN NEST: THAT'S WHAT TYPICALLY TAKES PLACE.
11 THAT'S WHAT'S TAKING PLACE IN A LOT OF THESE MASS TORT CASES
12 THAT ARE BEING HANDLED AROUND THE COUNTRY.

13 AFTER A COUPLE OF TRIALS, SMART TRIAL LAWYERS,
14 SOPHISTICATED COUNSEL FIGURE OUT WHAT'S HAPPENING. YOU PRICE
15 THE CASES AND YOU GO.

16 TO ME, GIVEN THE EVIDENCE YOU HAVE, THEY ARE SWINGING FOR
17 THE FENCES WITH THIS CLASS THEY WANT, AND THEY HAVEN'T SHOWN
18 THE BASIC PREDICATE.

19 THEY NOW ADMIT THAT THE SALARY STRUCTURES ARE NOT SO RIGID
20 THAT IMPACT ON SOME WOULD HAVE IMPACTED ALL.

21 THE COURT: ACTUALLY, I DISAGREE WITH YOU. I THINK
22 ON THE INTERNAL EQUITY AND ON THE RIGID WAGE STRUCTURE, IT'S
23 MUCH STRONGER NOW THAN IT WAS LAST TIME AROUND.

24 MR. VAN NEST: WELL, IF I COULD HAND UP WHAT I THINK
25 ARE THE KEY PIECES OF EVIDENCE, YOUR HONOR, AND ASK THE COURT

1 TO TAKE A LOOK AT JUST THE VERY FIRST TAB (HANDING) -- I HAVE
2 ONE FOR THE COURT AND ONE FOR THE CLERK.

3 MR. GLACKIN: I HAVE ONE.

4 MR. VAN NEST: THE QUESTION YOU ASKED LAST TIME, YOUR
5 HONOR, WAS CAN YOU SHOW, WITH CLASS-WIDE EVIDENCE, THAT
6 IMPACT -- THAT THE STRUCTURE IS SO RIGID THAT IMPACT TO ONE
7 WOULD AFFECT ALL?

8 TAB 1 IS FROM DR. LEAMER'S MOST RECENT DEPOSITION.

9 THE COURT: RIGHT. AND WE'RE GOING TO GET INTO THIS.
10 LET ME ASK MY QUESTIONS IF YOU DON'T MIND.

11 MR. VAN NEST: SURE.

12 THE COURT: OKAY?

13 MR. VAN NEST: OF COURSE.

14 THE COURT: ALL RIGHT. LET ME GO TO THE PLAINTIFFS.

15 WHAT EXACTLY IS YOUR THEORY OF IMPACT? HOW ARE YOU
16 EXPLAINING HOW, IF A COLD CALL WAS MADE, HOW THE INCREASE IN
17 SALARY WOULD AFFECT MORE PEOPLE THAN JUST THE RECIPIENT OF THE
18 CALL?

19 MR. GLACKIN: SO I THINK THAT WE WOULD SAY THAT THERE
20 ARE A NUMBER OF WAYS IN WHICH THIS WOULD HAVE OCCURRED.

21 AND OF COURSE WE'LL NEVER KNOW EXACTLY WHAT WOULD HAVE
22 HAPPENED BECAUSE OF THE AGREEMENTS.

23 BUT THE -- OUR THEORY OF IMPACT IS THAT IT'S NOT JUST ONE
24 COLD CALL THAT WOULD HAVE MOVED THE DEFENDANTS' ENTIRE
25 COMPENSATION STRUCTURE. WE'VE NEVER ADVOCATED THAT. I AGREE

1 THAT'S CRAZY TO SAY THAT ONE SINGLE COLD CALL IS GOING TO MOVE
2 THE COMPENSATION STRUCTURE FOR THOUSANDS OF EMPLOYEES.

3 INSTEAD, IF YOU LOOK AT MR. CAMPBELL'S TESTIMONY, THE CEO
4 OF INTUIT WHO ALSO IS A FIGURE AT GOOGLE AND APPLE, HE EXPLAINS
5 THAT WHAT HE WAS CONCERNED ABOUT AND THE REASON HE WANTED IN ON
6 THIS WAS IT WAS THE WAVES OF COLD CALLS. IT WAS SOMEBODY AT
7 GOOGLE PICKING UP THE PHONE AND STARTING AT THE LETTER A ON,
8 YOU KNOW, THE LIST OF ENGINEERS AT INTUIT AND CALLING AND JUST
9 DIALING DOWN THE PHONE TREE AND CALLING EVERY SINGLE ONE OF
10 THEM.

11 AND IT WAS THE DISRUPTION THAT WAS CAUSED BY THAT WAVE OF
12 CALLS, OR THOSE WAVES OF CALLS, THAT THE DEFENDANTS WERE TRYING
13 TO HEAD OFF THROUGH THESE ANTI-SOLICITATION AGREEMENTS.

14 NOW, HAD THOSE -- HAD THE AGREEMENTS NOT BEEN IN PLACE, WE
15 THINK THAT THE WORLD WOULD HAVE BEEN DIFFERENT IN A NUMBER OF
16 DIFFERENT WAYS.

17 WE THINK THAT WHEN THE WAVES OF COLD CALLS HAPPENED, THAT
18 THAT WOULD HAVE PUT UPWARD PRESSURE ON THE ENTIRE SALARY
19 STRUCTURE BECAUSE MANAGERS WOULD LET THE -- YOU KNOW, THE LOWER
20 LEVEL MANAGERS WOULD LET THE HIGHER LEVEL MANAGERS KNOW THAT
21 THE COMPANY'S EMPLOYEES WERE VULNERABLE, AND THAT WOULD HAVE
22 LED TO ADJUSTMENTS AT THE TOP OF THE SALARY STRUCTURE TO
23 IMPROVE THE SALARIES, OR THE COMPENSATION OF ALL EMPLOYEES.

24 BUT THE CEOS THEMSELVES, I MEAN, WHO ENTERED INTO THESE
25 AGREEMENTS IN THE FIRST PLACE WOULD HAVE BEEN AWARE, WOULD HAVE

1 KNOWN THAT THEY FACED INCREASED COMPETITION FROM OTHER, FROM
2 THEIR OTHER PEER COMPANIES IN SILICON VALLEY AND WOULD HAVE --
3 AND ELSEWHERE IN NORTHERN CALIFORNIA -- AND WOULD HAVE ACTED
4 PREEMPTIVELY. THEY AND THEIR MANAGERS WOULD HAVE ACTED
5 PREEMPTIVELY. THEY WOULD HAVE RESPONDED TO THE THREAT OF
6 COMPETITION AS WELL BY IMPROVING THE SALARIES OF THEIR
7 EMPLOYEES, OR THE COMPENSATION OF THEIR EMPLOYEES.

8 SO I THINK THAT, YOU KNOW, THE INCREASE -- IF YOU LOOK AT
9 THE -- IF YOU LOOK AT THE COMPANIES THEMSELVES -- THE REASON
10 I'M BEING A LITTLE GENERAL IS BECAUSE EACH OF THEM MANAGED
11 THEIR COMPENSATION IN SLIGHTLY DIFFERENT WAYS. I MEAN, THEY
12 DIDN'T -- THEY ALL USED THEIR OWN PROPRIETARY, YOU KNOW,
13 PAYMENT TOOL, WHICH IS -- OR WHATEVER SORT OF COMPUTER PROGRAM
14 THEIR MANAGERS WERE SUPPOSED TO LOG INTO.

15 THE COURT: I GUESS I DON'T UNDERSTAND HOW THIS
16 UPWARD PRESSURE ON THE ENTIRE SALARY STRUCTURE, HOW WAS THAT
17 SUPPOSED TO HAPPEN?

18 MR. GLACKIN: WELL, YOU -- THE EMPLOYEES -- YOU MEAN
19 FROM THE INCOMING COLD CALLS?

20 THE COURT: YEAH.

21 MR. GLACKIN: SO THE --

22 THE COURT: WHAT'S THE CHAIN OF EVENTS THAT CAUSES
23 THAT TO HAPPEN?

24 MR. GLACKIN: YEAH.

25 THE COURT: BECAUSE I DON'T SEE IT.

1 MR. GLACKIN: SO THE CHAIN OF EVENTS IS THAT SOMEBODY
2 AT -- YOU KNOW, ONE OF THE 800 RECRUITERS AT GOOGLE, FOR
3 EXAMPLE, PICKS UP THE PHONE, OR MAYBE SEVERAL OF THEM PICK UP
4 THEIR PHONES AND THEY NEED TO HIRE A SOFTWARE ENGINEER, AND SO
5 THEY GET, YOU KNOW, WHATEVER PHONE LIST THEY HAVE FOR INTUIT
6 AND THEY START AT LETTER A AND THEY GO DOWN TO LETTER Z AND
7 THEY CALL ALL THOSE PEOPLE, AND MAYBE THEY GET SOME LEADS, OR
8 MAYBE THEY DON'T.

9 BUT EITHER WAY, RIGHT THERE, THE PEOPLE WHO RECEIVED THOSE
10 CALLS HAVE GAINED SOME INFORMATION ABOUT HOW THEY ARE PERHAPS
11 MORE VALUABLE THAN WHAT THEY'RE BEING PAID AT INTUIT.

12 IF THE -- IF IT GOES TO ANOTHER LEVEL WHERE THEY RECEIVE
13 JOB INTERVIEWS OR OFFERS OR IF THEY GET A NEW JOB AND LEAVE,
14 THERE'S AN ADDITIONAL AND GREATER LEVEL OF DISRUPTION THAT
15 HAPPENS TO INTUIT.

16 THE COURT: WELL, I GUESS I -- I GUESS I DON'T SEE
17 HOW THAT'S HAPPENING. I SEE WHAT YOU'RE SAYING ABOUT THE
18 RECIPIENT OF THE CALL NOW HAVING A BETTER SENSE OF HOW MUCH HE
19 OR SHE IS WORTH, BUT I GUESS I'M NOT SEEING THE RELATIONSHIP
20 BETWEEN THAT ONE PERSON'S BETTER REALIZATION OF THEIR MARKET
21 VALUE AND HOW THAT TRANSLATES TO THE ENTIRE SALARY STRUCTURE.

22 MR. GLACKIN: WELL, THE POINT -- SO LET'S ASSUME THAT
23 SOMEBODY AT GOOGLE HAS PICKED UP THE PHONE AND CALLED 100
24 SOFTWARE ENGINEERS AT INTUIT, SO ALL OF A SUDDEN YOU'VE GOT 100
25 SOFTWARE ENGINEERS WHO HAVE GAINED SOME INFORMATION, AND THEN

1 YOU MAYBE ULTIMATELY GET A SMALLER NUMBER WHO HAVE RECEIVED JOB
2 OFFERS OR HAVE BEEN INVITED IN FOR INTERVIEWS WHO ARE GOING TO
3 GET MORE INFORMATION ABOUT THEIR WORTH.

4 THOSE SOFTWARE ENGINEERS -- NOW, ONCE THEY LEARN THAT
5 THEY'RE MORE VALUABLE, THEY'RE NOT JUST GOING TO SIT THERE AND
6 SAY, "OKAY, I UNDERSTAND THAT THE GOOGLE PEOPLE WOULD REALLY
7 LOVE TO HIRE ME, BUT I'M SO HAPPY AT INTUIT, I DON'T CARE WHAT
8 INTUIT PAYS ME."

9 I MEAN, THEY'RE GOING TO AGGREGATE. THEY'RE GOING TO TALK
10 TO THEIR MANAGER. THEY'RE GOING TO MAKE IT KNOWN THAT THEY
11 WANT MORE MONEY OR THAT THEY FEEL THEY ARE AT RISK OF BEING
12 HIRED AWAY AND THAT'S GOING TO PUT PRESSURE ON THE COMPANY.

13 AND THE DOCUMENTS SHOW THAT THE COMPANIES ARE AWARE OF THIS
14 THREAT AND THEY TAKE IT INTO CONSIDERATION. YOU KNOW, ONE
15 DOCUMENT I WOULD POINT TO IS -- IT WAS EXHIBIT 17, I BELIEVE,
16 TO MR. HARVEY'S ORIGINAL DECLARATION FROM 2012, WHICH IS THIS
17 DONNA MORRIS E-MAIL WHICH IS ADOBE_008692 AND IN WHICH
18 MS. MORRIS IS DESCRIBING THIS EXACT PROCESS.

19 SHE SAYS, "SALARIES ARE GETTING OUT OF WHACK, OUR
20 EMPLOYEES' SALARIES ARE MOVING APART, THERE'S NOT ENOUGH
21 COMPRESSION, WE NEED TO DO AN OUT OF CYCLE ADJUSTMENT TO DEAL
22 WITH THE COMPETITION THAT WE'RE GETTING FOR OUR COMPANIES,"
23 EXCUSE ME, "FOR OUR EMPLOYEES."

24 THE COURT: UM-HUM.

25 MR. GLACKIN: AND IT'S THAT KIND -- AND THIS WAS IN

1 FEBRUARY OF 2005, MERE MONTHS BEFORE ADOBE ENTERED INTO ITS
2 COMPANY-WIDE AGREEMENT WITH MR. JOBS.

3 AND SO THIS IS EXACTLY THE KIND OF THING THAT WE SAY WOULD
4 HAVE HAPPENED A LOT MORE OFTEN HAD THESE DEFENDANTS NOT ENTERED
5 INTO THESE AGREEMENTS.

6 THE COURT: WELL, I GUESS I'M STILL CONFUSED AS TO
7 IF -- LET'S SAY THE GOOGLE PERSON IS CALLING A THROUGH Z AT
8 INTUIT WITHIN A SPECIFIC JOB FAMILY. I CAN SEE WHY, WITHIN
9 THAT JOB FAMILY, SALARIES MIGHT GO UP AT INTUIT.

10 BUT WHAT I DON'T SEE IS WHY OTHER JOB FAMILIES AT INTUIT
11 WOULD BE AFFECTED BY THE INCREASE.

12 MR. GLACKIN: OH, OKAY. I UNDERSTAND.

13 THE COURT: YEAH. IF THESE ARE THE DIFFERENT SILOS,
14 HOW IS THAT COMPENSATION INFORMATION SUPPOSED TO BE TRANSLATED
15 ACROSS THE DIFFERENT FAMILIES?

16 MR. GLACKIN: RIGHT.

17 THE COURT: OR --

18 MR. GLACKIN: THIS IS -- I THINK WHEN YOU GET TO THE
19 LEVEL OF JOB FAMILIES AND JOB TITLES, THIS IS WHERE INTERNAL
20 EQUITY AND THE WAY THAT THESE COMPANIES STRUCTURE THEIR
21 COMPENSATION SYSTEMS STARTS TO PLAY THE BIG ROLE, BECAUSE THE
22 EVIDENCE SHOWS THAT THESE -- AND THIS IS SUMMARIZED IN OUR, AT
23 LENGTH IN THE BRIEFS AND IN DR. HALLOCK'S REPORT, THAT THESE
24 COMPANIES CARE ABOUT MAINTAINING RELATIVE POSITIONING BETWEEN
25 THEIR JOB TITLES AND THEIR JOB FAMILIES.

1 I MEAN, IT JUST MAKES SENSE, RIGHT, THAT YOU WOULD CARE
2 ABOUT HOW SOFTWARE ENGINEER 1 IS PAID RELATIVE TO SOFTWARE
3 ENGINEER 6, OR HOW A PARTICULAR FAMILY OF ENGINEERS IS PAID
4 RELATIVE TO ANOTHER FAMILY OF ENGINEERS.

5 IT'S NOT, I DON'T THINK, PARTICULARLY CONTROVERSIAL AT THIS
6 POINT ACTUALLY.

7 THE COURT: BUT TELL ME ABOUT THE RADFORD DATA.
8 WHICH COMPANIES ARE INCLUDED IN THAT DATA?

9 MR. GLACKIN: IT'S -- MY UNDERSTANDING IS THAT IT IS
10 A LARGE -- I MEAN, IT'S A LARGE GROUP OF COMPANIES. IT'S MORE
11 THAN JUST THESE FIRMS, THAT'S FOR SURE.

12 AND I THINK THAT YOU CAN BE -- IF YOU'RE A SUBSCRIBER TO
13 THE RADFORD DATA AS A COMPANY, I THINK YOU CAN BE SELECTIVE
14 ABOUT THE KINDS OF COMPANIES THAT YOU WANT DATA FOR, AGGREGATE
15 DATA FOR.

16 THE COURT: ARE THE DEFENDANTS THAT ARE IN THIS CASE
17 INCLUDED IN THE RADFORD DATA?

18 MR. GLACKIN: I BELIEVE SO.

19 THE COURT: HOW -- AND HOW IS THAT DATA ORGANIZED? I
20 KNOW -- I SAW SOMEWHERE THAT IT'S JOB TITLE AND CATEGORY.

21 MR. GLACKIN: RIGHT. I -- MY UNDERSTANDING IS THAT
22 THERE ARE -- YOU KNOW, THERE ARE CERTAIN BENCHMARK JOB TITLES
23 THAT ARE -- WHERE MARKET AVERAGES ARE REPORTED BY RADFORD FOR
24 A --

25 THE COURT: AND WHAT ARE THOSE?

1 MR. GLACKIN: WHAT ARE THE SPECIFIC BENCHMARK JOB
2 TITLES?

3 THE COURT: DO THEY INCLUDE ANY THAT WOULD BE IN YOUR
4 ALLEGED TECHNICAL EMPLOYEE CLASS?

5 MR. GLACKIN: YES, THEY DO.

6 THE COURT: WHAT --

7 MR. GLACKIN: I HAVE TO CONFESS TO YOU, I DON'T KNOW
8 THEM OFF THE TOP OF MY HEAD.

9 THE COURT: OKAY. BUT YOU THINK THAT THEY WOULD
10 INCLUDE JOB TITLES THAT ARE IN --

11 MR. GLACKIN: YES.

12 THE COURT: -- THE TECHNICAL CLASS?

13 MR. GLACKIN: CERTAINLY.

14 THE COURT: AND WHAT DO YOU MEAN BY "BENCHMARK"? WHY
15 DON'T YOU EXPLAIN THAT?

16 MR. GLACKIN: SURE. SO, I MEAN, THE WAY THAT
17 COMPANIES, IN GENERAL, USE THE RADFORD DATA IS THAT THE RADFORD
18 DATA SAYS -- THE DATA THAT THEY GET FROM RADFORD TELLS THEM
19 THAT A PARTICULAR KIND OF EMPLOYEE IN THE MARKET IS BEING PAID
20 ON AVERAGE A PARTICULAR WAGE, OR A PARTICULAR RANGE OF WAGES,
21 AND THE COMPANY DECIDES THEN, WHERE DO WE WANT TO BE RELATIVE
22 TO THE RADFORD DATA? DO WE WANT TO BE IN THE 50TH PERCENTILE,
23 WHICH WOULD MEAN WE'RE RIGHT AT THE MEDIAN? DO WE WANT TO BE
24 75TH PERCENTILE? OR DO WE WANT TO BE HIGHER OR DO WE WANT TO
25 BE LOWER PERHAPS?

1 AND THEN THEY WOULD USE THE -- THEN THEY WOULD JUST COMPUTE
2 OUT OF THE RADFORD DATA WHAT THAT BENCHMARK WOULD BE FOR THEIR
3 INTERNAL USE AND USE THAT TO SET THE SALARY STRUCTURES.

4 THE COURT: IS THE RADFORD DATA BROKEN DOWN BY
5 GEOGRAPHY IN ADDITION TO JOB TITLE?

6 MR. GLACKIN: I WOULD SUSPECT IT IS, BUT I DON'T KNOW
7 FOR SURE. I COULD ASK.

8 THE COURT: DO ANY OF THE DEFENDANTS -- MR. VAN NEST,
9 DO YOU KNOW? I'M CURIOUS ABOUT THIS, YOU KNOW, BENCHMARKING
10 AND --

11 MR. VAN NEST: YOUR HONOR --

12 THE COURT: -- THE RADFORD DATA.

13 MR. VAN NEST: YOU'VE GOT YOUR FINGER ON EXACTLY THE
14 PROBLEM, AND THE PROBLEM IS THAT YOU HAVE 2400 JOB TITLES, AND
15 YOU'RE QUITE RIGHT, IT MAKES NO SENSE THAT IF SOMEONE IN
16 SANTA CLARA THAT'S A SOFTWARE ENGINEER GETS OR DOESN'T GET A
17 CALL, A MASK DESIGNER OR A SEMICONDUCTOR PERSON IN NEW MEXICO
18 WOULD BE IMPACTED. THERE'S NO EVIDENCE OF THAT AND IT DOESN'T
19 MAKE ANY SENSE.

20 RADFORD IS MADE UP OF THOUSANDS OF COMPANIES, AND THERE ARE
21 THOUSANDS OF JOB TITLES, AND WHAT THE DEFENDANTS HAVE TESTIFIED
22 IS THAT WHEN THEY LOOK AT A JOB TITLE, THEY'RE BENCHMARKING TO
23 A SPECIFIC JOB TITLE.

24 INTERNAL EQUITY IS A FACTOR THAT ONE MIGHT USE IN LOOKING
25 AT SIMILAR EMPLOYEES DOING A SIMILAR THING AND PERFORMING THE

1 SAME WAY, SURE.

2 THE COURT: BUT ISN'T THE BENCHMARK THE WAY YOU'RE
3 ABLE TO DETERMINE WHERE YOU STAND RELATIVE TO YOUR PEERS IN
4 TERMS OF COMPENSATION?

5 MR. VAN NEST: IT WOULD ALLOW YOU, FOR A PARTICULAR
6 JOB TITLE, TO TELL WHERE YOU FELL WITHIN THE RANGE.

7 THE COURT: UM-HUM.

8 MR. VAN NEST: BUT, AGAIN, IT'S THOUSANDS OF
9 COMPANIES AND THOUSANDS OF JOB TITLES.

10 AND THEIR WHOLE THEORY -- YOU'VE GOT YOUR FINGER RIGHT ON
11 IT -- IS THAT EVERY ONE OF THESE 2400 JOB TITLES WOULD HAVE
12 AFFECTED EVERY OTHER ONE.

13 AND WHEN WE ASKED DR. LEAMER, "CAN YOU SHOW THAT THE
14 STRUCTURES ARE SO RIGID THAT IMPACT ON SOME WAS IMPACT ON ALL?"
15 HE NOT ONLY SAID, "NO, I DIDN'T SHOW THAT," BUT HE SAID, "I
16 DON'T BELIEVE IT'S TRUE."

17 TABS 1 AND 2 ARE THE QUOTES FROM HIS DEPOSITION, YOUR
18 HONOR, WHERE THIS WAS MADE ABUNDANTLY CLEAR THAT HE DID NOT --
19 HE WAS NOT ABLE TO CORRELATE TITLE TO TITLE; HE WAS NOT ABLE TO
20 SAY THAT A CHANGE TO SOME WOULD BE A CHANGE TO ALL; AND HE WAS
21 NOT ABLE TO SAY THAT IF YOU AFFECT THE SALARIES OF SOME PEOPLE,
22 YOU THEREFORE WILL AFFECT THE SALARIES OF SOME OR ALL BECAUSE
23 THE JOB STRUCTURE IS RIGID.

24 AND WE KNOW --

25 THE COURT: TELL ME, WHAT ARE THE RADFORD BENCHMARKS

1 FOR JOB TITLES THAT MIGHT BE WITHIN THIS PUTATIVE TECHNICAL
2 EMPLOYEE CLASS? IS THERE, LIKE, SOFTWARE ENGINEER?

3 MR. GLACKIN: YEAH.

4 THE COURT: TECHNICAL ENGINEER?

5 MR. GLACKIN: I MEAN, I BELIEVE, FOR EXAMPLE, THAT
6 THE TESTIMONY WAS THAT AT INTEL, YOU KNOW, THEY COULD BENCHMARK
7 80 PERCENT, 75 PERCENT OF THEIR WORK FORCE DIRECTLY OFF OF
8 RADFORD JOB TITLES.

9 SO I THINK THERE -- AS MR. VAN NEST SAYS, THERE ARE
10 THOUSANDS OF COMPANIES IN THE DATA SET, THERE'S LOTS OF JOB
11 TITLES, AND IF YOU'RE INTEL OR GOOGLE OR INTUIT, YOU CAN
12 REQUEST FROM RADFORD THE BENCHMARKS THAT YOU THINK ARE RELEVANT
13 TO YOU.

14 AND I DON'T -- I DON'T KNOW THE LIST OFF THE TOP OF MY
15 HEAD, BUT THE TESTIMONY IN GENERAL WAS THAT THESE COMPANIES
16 FOUND THIS TO BE VERY USEFUL BECAUSE THERE WAS VERY -- PRETTY
17 COMPREHENSIVE COVERAGE OF THEIR WORK FORCES.

18 AND INDEED, YOU CAN SEE WHY THERE WOULD BE AN INCENTIVE TO
19 STANDARDIZE YOUR WORK FORCE AROUND THIS PARTICULAR DATA SET.
20 IT WOULD HELP YOU BE ORGANIZED.

21 THE COURT: DID ANY OF THE FOUR REMAINING DEFENDANTS
22 BENCHMARK COMPENSATION AGAINST EACH OTHER OR AGAINST ANY OF THE
23 OTHER --

24 MR. VAN NEST: THERE'S NO EVIDENCE OF THAT, YOUR
25 HONOR.

1 MS. DERMODY: YES, THERE IS.

2 MR. GLACKIN: WELL, I DON'T -- THEY DIDN'T BENCHMARK
3 AGAINST EACH OTHER. THEY BENCHMARKED AGAINST RADFORD, WHICH
4 INCLUDED EACH OTHER'S DATA. I MEAN, I -- WE'RE NOT -- I DON'T
5 THINK WE'RE ARGUING THAT THEY -- THIS ISN'T -- WE'RE NOT SAYING
6 THEY CALLED EACH OTHER UP AND SET PRICE LEVELS.

7 MR. VAN NEST: YOUR HONOR, I DON'T THINK THAT ALL
8 FOUR REMAINING DEFENDANTS EVEN USED RADFORD.

9 THERE'S NO EVIDENCE THAT ANY DEFENDANT BENCHMARKED OFF OF
10 IT. THAT'S NEVER BEEN THEIR THEORY.

11 THEIR THEORY HAS BEEN THAT IF SOME EMPLOYEES WERE AFFECTED,
12 THERE WOULD THEN BE THIS RIPPLE THAT RIPPLES OUT, AND AS YOU
13 POINTED OUT, MAYBE THERE'S A RIPPLE TO THE FOLKS AROUND YOU IN
14 YOUR JOB, YOU KNOW, AREA.

15 BUT CERTAINLY NO EVIDENCE, EITHER ANECDOTALLY OR
16 ECONOMICALLY, OF ANYTHING GOING ANY PARTICULAR DISTANCE,
17 PARTICULARLY WHEN WE'RE TALKING ABOUT 60,000 PEOPLE. THAT'S
18 OUR POINT.

19 SO RADFORD IS UNIVERSAL --

20 THE COURT: DO ANY OF THE REMAINING FOUR DEFENDANTS
21 USE RADFORD?

22 MR. GLACKIN: I BELIEVE THEY ALL DO.

23 THE COURT: YEAH, THAT WAS MY IMPRESSION.

24 MR. GLACKIN: YEAH.

25 THE COURT: OKAY. SO I'M LOOKING AT A SLIDE FROM

1 GOOGLE ENTITLED "BENCHMARKING OVERVIEW. WHAT IS GOOGLE'S
2 INTENDED POSITION RELATIVE TO MARKET, NON-SALES."
3 AND IT TALKS ABOUT THE ELEMENT OF PAY, BASE SALARY,
4 INCENTIVE, EQUITY COMPOSITION, HOW DO WE MEASURE THE MARKET,
5 PEER COMPARATOR COMPANIES, AND IT LISTS APPLE, INTEL, INTUIT,
6 AND ADOBE, ALONG WITH OTHERS.

7 SO I READ THAT AND IT APPEARS THAT GOOGLE IS BENCHMARKING
8 ITS PAY AGAINST GOOGLE, INTEL, INTUIT, AND ADOBE.

9 AND THERE ARE SIMILAR DOCUMENTS FOR APPLE, SIMILAR
10 DOCUMENTS FOR ADOBE WHERE THEY ARE BENCHMARKING AGAINST EACH
11 OTHER.

12 SO --

13 MR. VAN NEST: YOUR HONOR --

14 THE COURT: DO YOU WANT TO RESPOND TO THAT?

15 MR. VAN NEST: YEAH, ABSOLUTELY.

16 THE COURT: YEAH.

17 MR. VAN NEST: THE POINT IS THAT RADFORD IS --

18 THE COURT: NO, THIS IS NOT RADFORD. THIS IS A
19 GOOGLE DOCUMENT SAYING WE BENCHMARK --

20 MR. VAN NEST: THAT'S RIGHT.

21 THE COURT: -- AGAINST OUR PEER COMPARATOR COMPANIES.

22 MR. VAN NEST: BY --

23 THE COURT: -- WHICH INCLUDE APPLE, INTEL, INTUIT,
24 AND ADOBE.

25 MR. VAN NEST: BY JOB. BY JOB TITLE. BY JOB TITLE,

1 RIGHT? THAT'S OUR POINT.

2 THE COURT: IT DOESN'T SAY THAT.

3 MR. VAN NEST: WELL, I --

4 THE COURT: GO AHEAD.

5 MR. VAN NEST: WELL, BUT THAT'S HOW ALL THESE SURVEYS
6 AND THAT'S HOW ALL THE EVIDENCE SHAKES OUT IS THERE ARE, AS I
7 SAID, THOUSANDS OF DIFFERENT JOB CATEGORIES, AND ALL THIS DATA
8 IS ORGANIZED BY JOB CATEGORY, AND SO WHILE THE COMPANIES WANT
9 TO KNOW WHERE THEY STAND WITHIN A PARTICULAR JOB TITLE, THERE'S
10 NO EVIDENCE OF ANY RIPPLE AFFECT THAT WOULD AFFECT THE WHOLE
11 JOB STRUCTURE. THAT'S MY POINT.

12 THE COURT: SO THEN SHOULD THERE JUST BE A CLASS
13 CERTIFICATION FOR EACH JOB TITLE AND SAY, OKAY, SOFTWARE
14 ENGINEER, THERE'S BENCHMARKING AMONGST THESE REMAINING
15 DEFENDANTS, AMONGST EACH OTHER, AND SO FOR THAT JOB TITLE, THAT
16 WILL BE CLASS NUMBER ONE, SOFTWARE ENGINEER.

17 MR. VAN NEST: THEY -- THEY --

18 THE COURT: WHY NOT?

19 MR. VAN NEST: WELL, THEY HAVEN'T --

20 THE COURT: WHY NOT?

21 MR. VAN NEST: LET ME SAY TWO THINGS.

22 THE COURT: OKAY.

23 MR. VAN NEST: THEY HAVEN'T SHOWN FOR ANY ONE TITLE
24 THAT IF SOME FOLKS IN THAT TITLE GET A BENEFIT, OR DON'T, IT'LL
25 AFFECT EVERYBODY. THEY HAVEN'T SHOWN THAT BECAUSE WHAT

1 DR. MURPHY SHOWS, AND WHAT THE RAW DATA SHOWS, IS THAT THERE'S
2 HUGE VARIATION YEAR TO YEAR WITHIN A TITLE.

3 IN OTHER WORDS, THE AVERAGES MOVE, BUT MANY PEOPLE WITHIN A
4 JOB TITLE MOVE CONTRA TO THE AVERAGE, SOME BY A LITTLE, SOME BY
5 A LOT.

6 IF YOU LOOK AT TAB 4, YOUR HONOR, WHICH I'VE PLACED BEFORE
7 YOU, DR. MURPHY PUTS THE RAW DATA FOR EVERY YEAR, FOR VARIOUS
8 TITLES, AND WHAT YOU SEE ARE CHARTS EXACTLY LIKE THE ONE THAT
9 YOU SEE IN TAB 4 WHERE YOU HAVE MOVEMENT UP BY A LITTLE FOR
10 SOME EMPLOYEES, MOVEMENT UP BY A LOT, MOVEMENT DOWN BY A
11 LITTLE, MOVEMENT DOWN BY A LOT.

12 THERE IS NO --

13 THE COURT: AND I AM GOING TO GET TO ALL OF THE
14 MURPHY AND LEAMER CHARTS AND MATERIALS.

15 MR. VAN NEST: BUT CERTAINLY -- CERTAINLY, YOUR
16 HONOR, CERTAINLY THERE IS MERIT IN SAYING YOU CAN'T CERTIFY A
17 60,000 EMPLOYEE CLASS WITH 2400 JOB TITLES WHERE THEY DON'T
18 HAVE ANY EVIDENCE OF ANY CORRELATION BETWEEN AND AMONG JOB
19 TITLES.

20 AND AS YOU POINTED OUT LAST TIME, CLEARLY THERE ARE SOME
21 CATEGORIES OF EMPLOYEES THAT FOLKS CARED ABOUT MORE THAN
22 OTHERS.

23 THE COURT: AND WHICH ONES ARE THOSE?

24 MR. VAN NEST: WELL, I THINK MOST OF THE PEOPLE IN
25 THE DOCUMENTS YOUR HONOR CITED LAST TIME ARE SOFTWARE ENGINEERS

1 AND THEY TENDED TO BE PEOPLE MORE SENIOR THAN OTHERS, AND THE
2 TOP TALENT, I THINK, WAS THE QUOTE THAT YOU GAVE AND THE
3 SOFTWARE ENGINEERS MAKE UP -- AND THERE'S A WIDE RANGE OF
4 SOFTWARE ENGINEERS, TOO, SO THEY DO A WIDE VARIETY OF THINGS.

5 BUT CERTAINLY HERE WHERE WE'VE GOT TWO-THIRDS OF OUR CLASS
6 AT INTEL WITH JOBS LIKE SEMICONDUCTOR MANUFACTURER AND CHEMICAL
7 ENGINEER, ELECTRICAL ENGINEER, MASK DESIGNER, THEY HAVE NOTHING
8 TO DO WITH ANY OF THE DOCUMENTS YOUR HONOR HAS SEEN OR CITED,
9 OR ANY OF THE EVIDENCE IN THE CASE.

10 AND IF THEY HAD GONE AND SAID -- AND TAKEN YOUR ADVICE AND
11 TRIED TO FIGURE OUT WHICH OF THESE CLASSES OR TITLES CAN I SHOW
12 SOME CORRELATION WITHIN, MAYBE WE'D HAVE SOMETHING TO TALK
13 ABOUT.

14 THEY HAVEN'T DONE EVEN THAT. THEY HAVEN'T DONE EVEN THAT
15 BECAUSE, AS TAB 4 SHOWS -- AND I'VE GOT A COUPLE OTHER TABS
16 WHEN WE GET TO THEM, YOUR HONOR -- THERE IS HUGE VARIATION
17 WITHIN EACH TITLE.

18 FOR EXAMPLE --

19 THE COURT: SO LET ME MAKE SURE I UNDERSTAND.

20 SO THE DEFENDANTS WOULD CONCEDE THAT THERE'S BENCHMARKING
21 WITHIN A JOB TITLE, BUT YOU'RE SAYING THERE'S NO RELATIONSHIP
22 ACROSS JOB TITLES?

23 MR. VAN NEST: WE'RE -- YES. WE'RE SAYING THAT --

24 THE COURT: OKAY.

25 MR. VAN NEST: -- WHEN PEOPLE SAY, "I WANT TO BE 65

1 PERCENT OF SOMETHING," THEY'RE LOOKING AT A SPECIFIC JOB
2 CLASSIFICATION.

3 THERE IS NO BENCHMARKING --

4 THE COURT: SO THE CLASSIFICATION CAN CERTAINLY
5 INCLUDE A FAMILY OF JOB TITLES, THOUGH.

6 MR. VAN NEST: I THINK THEY'RE RATHER SPECIFIC IN
7 RADFORD, BUT, YOU KNOW, I DON'T WANT TO SPEAK -- RADFORD IS NOT
8 THE ONLY SURVEY OUT THERE.

9 BUT CERTAINLY, YOUR HONOR, CERTAINLY NOBODY IS LOOKING AT
10 RADFORD TO BENCHMARK ACROSS JOB TITLES.

11 AND, AGAIN, EVEN WITHIN TITLES, THE POINT THAT WE'RE MAKING
12 IS THERE IS AN ENORMOUS RANGE OF DISCRETION. THESE SALARY
13 BANDS WHICH AFFECTED SOME OF THE BASE SALARIES, SOME OF THEM
14 WERE \$100,000, \$100,000 WITHIN A BAND, AND THAT'S JUST SALARY,
15 NOT BONUS OR EQUITY.

16 THAT'S WHY YOU SEE THINGS LIKE TAB 4 WHERE SOME
17 EMPLOYEES --

18 THE COURT: WE'RE GOING TO GET TO MR. MURPHY, BUT I
19 THINK WE'LL HAVE WAY MORE THAN ENOUGH STATISTICS THAN WE ALL
20 WANT BY THE END OF THE DAY.

21 MR. VAN NEST: I THINK --

22 THE COURT: LET ME ASK A QUESTION.

23 MR. VAN NEST: SURE.

24 THE COURT: AND THIS GOES TO MR. GLACKIN.

25 WHAT EVIDENCE CAN YOU CITE TO THAT THE DEFENDANTS VIEWED

1 EACH OTHER AS PEERS FOR COMPARING COMPENSATION, FOR HAVING SOME
2 TYPE OF COMPENSATION EQUITY ACROSS COMPANIES?

3 MR. GLACKIN: SO I'M LOOKING AT SOMETHING THAT WAS
4 JUST KINDLY HANDED TO ME.

5 DO YOU KNOW WHAT THIS IS AN EXHIBIT TO?

6 MR. HARVEY: THAT'S EXHIBIT NUMBER -- THAT'S THE
7 CISNEROS DECLARATION.

8 MR. GLACKIN: SO THIS WOULD BE AN EXHIBIT TO
9 MS. CISNEROS'S DECLARATION, IT'S PLAINTIFF'S 621, WHICH IS A
10 FAIRLY TYPICAL DOCUMENT. IT'S AN E-MAIL WHERE -- I FEEL LIKE I
11 OUGHT TO JUST LET MR. VAN NEST AT LEAST SEE WHAT I'M TALKING
12 ABOUT.

13 MR. VAN NEST: THANK YOU.

14 MR. GLACKIN: IN FACT, WE CAN STAND HERE TOGETHER.

15 THIS IS AN E-MAIL, AN INTERNAL E-MAIL TO GOOGLE. THE TOP
16 LINE RECIPIENT IS SHONA BROWN, WHO'S THE HEAD PERSON AT GOOGLE
17 WITH RESPECT TO H.R. AND COMPENSATION, AND IT'S A -- THERE'S A
18 SPECIFIC CALL OUT IN THE SECOND PAGE -- AND THIS IS PLAINTIFF'S
19 621, GOOGLE/HIGH-TECH --

20 EXCUSE ME, BOB.

21 MR. VAN NEST: SURE.

22 MR. GLACKIN: YEAH, 00336877.

23 AND, YOU KNOW, PARTWAY THROUGH THE E-MAIL, THEY ASK
24 THEMSELVES THE QUESTION, WELL, HOW DOES OUR OVERALL BUDGET
25 COMPARE TO WHO WE CONSIDER TO BE OUR PEERS?

1 AND THE -- THE PEERS THAT ARE LISTED HERE ARE ADOBE,
2 AMAZON, APPLE, CISCO, AND INTEL.

3 AND THEY ASK, HOW DOES WHAT WE'RE DOING IN TERMS OF MERIT
4 INCREASES AND BONUS POOL THIS YEAR COMPARE TO THOSE COMPANIES?

5 AND I THINK THERE ARE --

6 THE COURT: WHAT'S THE -- WHAT'S THAT EXHIBIT NUMBER?
7 THAT'S THE CISNEROS DECLARATION?

8 MR. GLACKIN: IT'S PLAINTIFF'S EXHIBIT 621, AND I'LL
9 READ THE BATES NUMBER IN CASE THAT NEEDS TO BE LOOKED AT LATER.
10 IT'S GOOGLE/HIGH-TECH -- 00 -- 621 TO CISNEROS, 00336877.

11 THE COURT: 0033687?

12 MR. GLACKIN: 6877.

13 THE COURT: OKAY. THAT'S THE BATES NUMBER.

14 MR. GLACKIN: AND, YOU KNOW, I DEPOSED MR. SMITH, THE
15 CEO OF INTUIT, AND THERE WAS A -- YOU KNOW, THERE WAS A --
16 THERE WAS AN AWARENESS AMONG, CERTAINLY AT INTUIT, AND I
17 BELIEVE AT THESE OTHER FIRMS, OF WHAT IT MEANT TO BE SORT OF A
18 TOP RANKED FIRM AND THEY HAD A VIEW OF THEMSELVES AND A DESIRE
19 TO BE THAT, AND THE OTHER TOP RANKED FIRMS IN SILICON VALLEY
20 ARE THE DEFENDANTS, YOU KNOW, INTEL, APPLE, GOOGLE.

21 I MEAN, THESE COMPANIES ARE THE -- THEY ARE THE STABLE
22 INSTITUTIONAL, YOU KNOW, CREME DE LA CREME, TOP OF THE CROP IN
23 TERMS OF WHO YOU'D WANT TO WORK FOR, AND THERE ARE -- THERE ARE
24 MANY EXAMPLES IN THE RECORD OF THEM LOOKING AT EACH OTHER TO
25 COMPARE THEMSELVES IN TERMS OF COMPENSATION.

1 THE COURT: BUT HOW DOES THAT -- IT APPEARS THAT EACH
2 OF THE REMAINING DEFENDANTS HAD THESE ON-LINE TOOLS TO GET
3 INFORMATION ABOUT A SPECIFIC JOB TITLE, THE SALARY BAND AND
4 WHATNOT, AND ALSO TO SORT OF DO SOME BENCHMARKING.

5 WHERE DID -- DID YOU GET INTO, IN ANY OF THE DEPOSITIONS,
6 HOW THOSE ON-LINE TOOLS WERE CREATED, WHAT INFORMATION WAS USED
7 AND INPUTTED TO CREATE THAT SYSTEM? OR --

8 MR. GLACKIN: WELL, I THINK WE DID GET INTO THAT IN
9 THE DEPOSITIONS.

10 THE COURT: OKAY.

11 MR. GLACKIN: THE -- YOU KNOW, THE ANSWER IS THAT THE
12 H.R. DEPARTMENT WOULD INPUT THINGS LIKE RADFORD DATA, OR WHAT
13 PERCENTILE THEY WANTED TO BE AT VIS-A-VIS THE RADFORD DATA.

14 AND ANYTHING ELSE IN TERMS OF LIKE -- YOU KNOW, FOR
15 EXAMPLE, WHAT THE -- YOU SEE THIS IN THE BRIEFS. I MEAN, WHAT
16 THE APPROPRIATE BONUS WAS FOR ONE OF FIVE PERFORMANCE RANKINGS,
17 SO THAT WOULD BE SOMETHING THAT WOULD BE DETERMINED AT THE TOP,
18 WHAT THE APPROPRIATE PERCENTAGE OR EQUITY GRANT WAS FOR A
19 PARTICULAR -- YOU KNOW, HOW YOU DID THAT IN TERMS OF YOUR
20 PERFORMANCE RANKING.

21 AND THEN IF YOU'RE THE -- AND ALL OF THAT ALSO WE SEE IN
22 THE DOCUMENTS, AND THIS IS EXPLAINED IN THE BRIEF, IS CURVED
23 OUT. I MEAN, IT'S ALL SET RELATIVE.

24 SO, FOR EXAMPLE, AT INTEL, INTEL -- YOU KNOW, THERE'S A LOT
25 OF TALK ABOUT VARIABLE COMPENSATION, BUT INTEL WANTED TO MAKE

1 SURE THAT 60 TO 70 PERCENT OF ITS MANAGERS, OR EXCUSE ME, OF
2 ITS EMPLOYEES WERE RATED MEDIUM, AND THEN IT WANTED TO MAKE
3 SURE THAT DIFFERENT PERCENTILES AT THE TOP AND THE BOTTOM WERE
4 RATED EXCELLENT OR, YOU KNOW, NEEDS IMPROVEMENT.

5 AND IT WAS STRUCTURED OUT ON A CURVE, JUST LIKE IT WAS AT
6 ADOBE. ADOBE'S H.R. MANAGER TESTIFIED THAT THEY SET
7 COMPENSATION ON A BELL CURVE. I MEAN, IT'S HARD TO IMAGINE A
8 MORE STRUCTURED COMPENSATION SYSTEM.

9 THE COURT: WHAT ARE THE THOUSANDS OF COMPANIES THAT
10 ARE IN RADFORD? WHAT OTHER TYPES OF JOBS, I'M ASSUMING IT'S
11 NOT ALL TECH, ARE IN RADFORD?

12 MR. GLACKIN: NO. RADFORD IS A HUGE COMPANY AND IT
13 SERVES ALL KINDS OF DIFFERENT CORPORATIONS IN AMERICA,
14 INCLUDING PEOPLE -- YOU KNOW, COMPANIES THAT HAVE NOTHING TO DO
15 WITH TECH.

16 AND WHAT YOU ARE -- IF YOU'RE A CLIENT OF RADFORD, YOU GIVE
17 THEM -- YOU TELL THEM WHAT YOU'RE INTERESTED IN. YOU SAY, "I
18 WANT TO KNOW ABOUT THESE KINDS OF JOBS OR THESE JOB TITLES. I
19 EMPLOY THESE KINDS OF PEOPLE. I EMPLOY PEOPLE WHO DO THIS KIND
20 OF WORK."

21 AND THEN RADFORD GIVES YOU, YOU KNOW, A SELECTION OF 30 OR
22 50 OR 100 OR MAYBE MORE JOB TITLES.

23 THE COURT: AND WHERE ARE ALL THESE COMPANIES BASED?
24 IS IT WORLDWIDE?

25 MR. GLACKIN: WELL, THERE'S A -- I MEAN, RADFORD

1 HAS -- I DON'T KNOW THE ANSWER TO THAT QUESTION. I DON'T KNOW
2 IF RADFORD INCLUDES INTERNATIONAL DATA.

3 BUT I KNOW THAT RADFORD DOES HAVE A SUBSET OF TECH SECTOR
4 DATA WHICH WOULD HAVE BEEN THE SUBSET THAT THIS -- THAT THESE
5 FAMILY OF COMPANIES, OR GROUP OF COMPANIES WOULD HAVE
6 SUBSCRIBED TO, OR DID SUBSCRIBE TO.

7 THE COURT: MR. VAN NEST, DO YOU KNOW IF RADFORD HAS
8 GLOBAL SALARY INFORMATION?

9 MR. VAN NEST: I BELIEVE IT DOES, YOUR HONOR. BUT
10 YOU CAN GET VARIOUS SLICES OF RADFORD.

11 BUT A MORE IMPORTANT POINT, I THINK, YOUR HONOR, IS RADFORD
12 REALLY IS NOT RELEVANT TO THEIR THEORY OF THIS CASE. IT'S NOT
13 A PRICE FIXING CASE. THAT'S NOT THE POINT.

14 THEIR THEORY IS THAT WHEN SOME COLD -- WHEN COLD CALLS WERE
15 PROHIBITED, SOME PEOPLE IN EACH COMPANY DIDN'T GET A CALL AND
16 DIDN'T GET INFORMATION AND, THEREFORE, THAT INFORMATION DIDN'T
17 BUBBLE UP AND, THEREFORE, THERE WAS SUPPRESSION THAT PROPAGATED
18 OUT TO EVERYBODY.

19 RADFORD HAS ABSOLUTELY NOTHING TO DO WITH THAT. RADFORD IS
20 MARKET DATA FROM THOUSANDS OF COMPANIES THAT ALL COMPANIES LOOK
21 AT, NOT JUST THESE, BUT HEWLETT-PACKARD AND EVERYBODY HERE IN
22 THE VALLEY AND EVERYWHERE ACROSS THE UNITED STATES. RADFORD IS
23 NOT A PART OF THEIR THEORY OF IMPACT.

24 AND WHAT I KEEP COMING BACK TO IS THERE IS NO CORRELATION
25 BETWEEN JOB TITLES, EITHER WITHIN A COMPANY OR ACROSS

1 COMPANIES. DR. LEAMER LOOKED AT ALL OF THIS AND HE CONCLUDED
2 HE COULDN'T FIND CORRELATION BETWEEN JOB TITLES ACROSS
3 COMPANIES BECAUSE THERE IS NONE, AND THAT'S WHAT I KEEP COMING
4 BACK TO.

5 IF YOU WANT TO CERTIFY SOMETHING, IT CAN'T POSSIBLY BE A
6 CLASS OF 2400 JOB TITLES.

7 NOW, EVEN WITHIN A FEW JOB TITLES, WE HAVE SHOWN, AND I
8 DON'T THINK THEY'RE DISPUTING IT, THAT THERE'S A WIDE VARIATION
9 IN WHAT PEOPLE ARE PAID, BECAUSE MANAGERS -- AND THERE ARE
10 12,000 OF THEM IN THESE COMPANIES THAT ARE, THAT ARE
11 DEFENDANTS -- THEY HAD ABILITY, WITHIN WIDE BANDS, TO AWARD
12 DIFFERENT SALARIES, DIFFERENT BONUSES, DIFFERENT EQUITY, AND
13 THAT'S WHY TAB 4 LOOKS LIKE IT DOES.

14 THE COURT: WE'RE GOING TO GET TO THAT. I HAVE
15 SPECIFIC QUESTIONS ABOUT THOSE CHARTS.

16 MR. VAN NEST: OKAY. BUT THAT'S -- MY POINT IS
17 THERE'S WIDE VARIATION AND FLEXIBILITY.

18 THE COURT: I HEAR YOU.

19 MR. VAN NEST: NOT LOCKSTEP.

20 MR. GLACKIN: MAY I RESPOND TO ONE OF YOUR QUESTIONS
21 NOW THAT I HAVE BETTER INFORMATION, WHICH IS THE DATA THAT
22 THESE COMPANIES SUBSCRIBED TO FROM RADFORD WAS U.S., SO THESE
23 COMPANIES WERE GETTING THE TECH SECTOR SLICE OF U.S. WAGE DATA
24 THAT WAS BEING COLLECTED BY RADFORD.

25 MR. VAN NEST: YOU CAN CUT IT THINNER THAN THAT, TOO.

1 INSIDE SILICON VALLEY, OUTSIDE SILICON VALLEY. OBVIOUSLY MOST
2 OF INTEL'S EMPLOYEES ARE OUTSIDE SILICON VALLEY. MORE THAN
3 HALF OF THE PROPOSED CLASS IS OUTSIDE SILICON VALLEY.

4 SO, AGAIN, I THINK, YOUR HONOR, RADFORD, WE'RE SORT OF
5 BARKING UP THE WRONG TREE. IT'S NOT THEIR THEORY OF IMPACT.

6 THE COURT: WELL, IT'S A WAY THAT YOU CAN GET A
7 SPREADING OF EITHER THE SUPPRESSION OR -- I SHOULD SAY THE
8 ALLEGED SUPPRESSION OR ALLEGED SALARY INCREASE BASED ON THE
9 COLD CALLING IS IF IT SORT OF GETS INCORPORATED INTO RADFORD
10 AND THEN OTHER COMPANIES ARE BENCHMARKING OFF OF RADFORD, YOU
11 CAN SEE HOW THE EFFECTS COULD GET PROPAGATED AND SPREAD --

12 MR. GLACKIN: YES.

13 THE COURT: -- BY BENCHMARKING THROUGH THESE, IN
14 ADDITION TO JUST WORD OF MOUTH AND --

15 MR. VAN NEST: THERE ARE THOUSANDS OF --

16 THE COURT: -- INTERNAL EQUITY.

17 MR. VAN NEST: EXCUSE ME.

18 THE COURT: GO AHEAD.

19 MR. VAN NEST: THERE ARE THOUSANDS OF COMPANIES THAT
20 FEED THE RADFORD DATA. THEY HAVEN'T EVEN ATTEMPTED TO SHOW
21 THAT THESE COMPANIES, EITHER ONE OF THEM OR ALL FOUR OF THEM,
22 COULD AFFECT THE RADFORD DATA.

23 I MEAN, THERE ARE THOUSANDS -- YOU'VE GOT HEWLETT-PACKARD.
24 YOU'VE GOT -- HOW MANY COMPANIES DO WE HAVE DOWN HERE THAT ARE
25 NOT IN THE GROUP, NOT TO MENTION PEOPLE AROUND THE

1 UNITED STATES, ENORMOUS TECH COMPANIES?

2 SO RADFORD IS NOT IMPACTED BY WHAT THESE COMPANIES DO, NOR
3 ARE THEY CLAIMING THAT.

4 WHAT THEY'RE CLAIMING IS PEOPLE IN THE COMPANIES DIDN'T
5 GET THE INFORMATION THEY WANTED AND, THEREFORE, THEIR WAGES
6 WERE SUPPRESSED AND, THEREFORE, THAT SUPPRESSION WOULD HAVE
7 PROPAGATED OUT ACROSS JOB TITLES.

8 AND THAT'S WHERE WE'RE SAYING THEY HAVE THIS COMPLETE
9 FAILURE OF PROOF. THEY CAN'T SHOW THAT.

10 THEY'VE TRIED TO SHOW, THROUGH AVERAGING, THAT THERE'S
11 SOME SIMILARITY WITHIN TITLES. THAT'S WHAT DR. LEAMER DID.

12 BUT AVERAGING DOES EXACTLY WHAT YOU TOLD THEM NOT TO DO
13 LAST TIME. YOU SAID, "TELL ME HOW YOU CAN SHOW, WITH ALL THIS
14 VARIATION, THAT THE STRUCTURE WAS SO RIGID THAT AN IMPACT ON
15 SOME WOULD IMPACT OTHERS."

16 AND INSTEAD OF LOOKING AT THE KIND OF VARIATION THAT
17 EXISTS, HE AVERAGED IT.

18 AND THAT'S WHAT JUDGE ALSUP IN GPU AND WHAT JUDGE BRADY IN
19 REED -- JUDGE GRADY IN REED SAID. IF YOU'RE LOOKING TO SEE
20 WHETHER THERE IS IMPACT ON ALL OR NEARLY ALL, OR ON A WIDE
21 GROUP, YOU CAN'T AVERAGE, BECAUSE THE FACT THAT AN AVERAGE GOES
22 UP OR DOWN DOESN'T TELL YOU WHETHER SOME, A LOT, A FEW, OR MANY
23 WERE IMPACTED. THAT'S THE WHOLE POINT.

24 AND THEY DID EXACTLY WHAT JUDGE ALSUP, JUDGE GRADY, THE
25 WEISFELDT CASE, THE FLEISHMAN CASE, ALL THESE CASES SAY WHEN

1 THE ISSUE IS, IS THERE A BAND OF EMPLOYEES FOR WHOM WE CAN
2 PROVE THAT ALL OR NEARLY ALL WERE IMPACTED, YOU CANNOT AVERAGE.
3 THAT IS BECAUSE -- BECAUSE THE AVERAGING TAKES AWAY THE WIDE
4 VARIATION THAT EXISTS, AND THAT'S WHY JUDGE ALSUP REFUSED TO
5 CERTIFY IN GPU.

6 JUDGE GRADY REFUSED TO CERTIFY --

7 THE COURT: WELL, HE DID CERTIFY THE CLASS IN GPU.

8 I AGREE THAT HE DID ALSO DENY CERTIFYING --

9 MR. VAN NEST: RIGHT. THERE WAS A VERY --

10 THE COURT: HE DENIED IN SOME AND GRANTED IN OTHERS.

11 MR. VAN NEST: WHAT HE GRANTED WAS A VERY SMALL GROUP
12 OF PEOPLE WHO DID EVERYTHING IN A SAME WAY ON A WEBSITE AND
13 BOUGHT THE SAME PRODUCT AT THE SAME TIME.

14 THAT'S VERY DIFFERENT -- IN THE REED CASE, JUDGE GRADY
15 SAID, "I'M NOT GOING TO CERTIFY A CLASS OF EVEN 19,000 NURSES
16 THAT ALL HAVE THE SAME TITLE WHO ARE PAID ON A WAGE GRID THAT
17 DOESN'T EVEN MEASURE PERFORMANCE, JUST YEARS OF SERVICE."

18 THE COURT: UM-HUM.

19 MR. VAN NEST: HE SAID, "BECAUSE YOU AVERAGED, YOU'RE
20 NOT TELLING ME WHETHER OR NOT THERE IS IMPACT ON SOME, ALL, OR
21 NEARLY ALL MEMBERS OF THE CLASS."

22 AND SO HE SAID, "NO CERT. YOU HAVE TO PROCEED BY
23 INDIVIDUAL CLAIMS OR IN A MASS ACTION," AS I MENTIONED EARLIER,
24 WHICH IS EXACTLY THE RESULT THAT SHOULD FLOW HERE, PARTICULARLY
25 WHERE YOU MADE VERY CLEAR LAST TIME THAT BASED ON THEIR

1 THEORY --

2 THE COURT: LET ME INTERRUPT YOU ONE SECOND.

3 MR. VAN NEST: YEAH.

4 THE COURT: SO THE PLAINTIFFS HAVE SUBMITTED EVIDENCE
5 THAT ADOBE USES SALARY MATRIXES, A SALARY PLANNING TOOL, AN
6 ON-LINE SALARY RANGE WEBSITE FOR MANAGERS, AND SOMETHING CALLED
7 THE OMNITURE CURRENT COST STRUCTURE.

8 CAN YOU GIVE US A LITTLE INFORMATION ABOUT WHAT THAT
9 OMNITURE CURRENT COST STRUCTURE IS?

10 OR MAYBE THE PLAINTIFFS KNOW. WHOEVER KNOWS THE ANSWER TO
11 THIS QUESTION.

12 MR. VAN NEST: YOUR HONOR, I CAN ANSWER GENERALLY --

13 THE COURT: OKAY.

14 MR. VAN NEST: -- THAT ALL THESE COMPANIES --

15 THE COURT: UM-HUM.

16 MR. VAN NEST: -- HAVE SOME KIND OF COMPENSATION
17 TOOLS THAT THEY USE. OBVIOUSLY IF YOU HAVE 100,000 EMPLOYEES
18 LIKE INTEL, YOU'VE GOT TO HAVE SOME KIND OF TOOL TO HELP YOU
19 MANAGE COMPENSATION.

20 THE POINT OF ALL OF THESE --

21 THE COURT: AND WHY IS THAT, FOR INTERNAL EQUITY?

22 MR. VAN NEST: NO, TO MANAGE THE COMPANY.

23 THE COURT: WHY IS THAT?

24 MR. VAN NEST: IF YOU'VE GOT A HUNDRED THOUSAND
25 PEOPLE, SOMEBODY HAS TO KNOW WHAT THEY'RE BEING PAID. SOMEBODY

1 HAS TO KNOW --

2 THE COURT: YOU DON'T NEED A TOOL FOR THAT. YOU JUST
3 NEED A SPREADSHEET WITH THE NAME AND AMOUNT OF MONEY THEY'RE
4 MAKING.

5 WHAT IS THE OMNITURE, PLEASE?

6 MR. VAN NEST: IT'S A COMPANY THAT ADOBE ACQUIRED.

7 THE COURT: OKAY.

8 MR. VAN NEST: OMNITURE WAS BASICALLY AN ON-LINE
9 ASSISTANT FOR MARKETING. IT'S NOT REALLY SOMETHING THAT DID
10 TOO MUCH WITH COMPENSATION. THE MAIN POINT OF OMNITURE WAS
11 ON-LINE MARKETING AND THEY WERE ACQUIRED BY ADOBE SEVERAL YEARS
12 AGO. MY DAUGHTER USED TO WORK THERE, SO I KNOW.

13 BUT GETTING BACK TO MY PRINCIPAL POINT, YOUR HONOR --

14 THE COURT: WELL, LET ME ASK MR. GLACKIN, DO YOU HAVE
15 ANY OTHER INFORMATION ON THIS, OR IS IT NOT REALLY RELEVANT TO
16 COMPENSATION?

17 MR. GLACKIN: I DON'T HAVE ANY MORE INFORMATION FOR
18 YOU, YOUR HONOR.

19 THE COURT: OKAY.

20 MR. GLACKIN: SORRY.

21 THE COURT: ALL RIGHT.

22 MR. GLACKIN: I'D BE HAPPY TO RESPOND TO SOME THINGS
23 THAT MR. VAN NEST HAS SAID ABOUT OTHER CASES. I'M HAPPY TO
24 TAKE YOUR QUESTIONS.

25 THE COURT: YOU KNOW, WE TALKED A LOT ABOUT REED AND

1 GPU LAST TIME, SO I'M OKAY.

2 LET ME ASK THE NEXT QUESTION. LET ME ASK MR. GLACKIN, LAST
3 TIME AROUND YOU ALL HAD ARGUED THAT THE COURT SHOULD GRANT
4 CLASS CERT IF COMMON PROOF OF THE DEFENDANTS' ANTITRUST
5 CONSPIRACY WOULD BE THE PROMINENT ISSUE AT TRIAL.

6 MR. GLACKIN: CORRECT.

7 THE COURT: IS THAT -- IS THAT STILL YOUR POSITION?

8 MR. GLACKIN: YES, YOUR HONOR. I MEAN, WE THINK --
9 WE -- OUR POSITION IS THAT CLASS CERTIFICATION COULD BE GRANTED
10 BASED SOLELY ON THE FACT -- ON THE OVERWHELMING ISSUE OF THE
11 DEFENDANTS' LIABILITY FOR THE COMMON ILLEGAL AGREEMENTS.

12 THE COURT: BUT HOW WOULD THAT PLAY OUT?

13 MR. GLACKIN: WELL, I MEAN, I THINK THAT THIS GETS --
14 BACKS INTO A LITTLE BIT OF THE CONVERSATION WE WERE HAVING
15 EARLIER ABOUT TREATING THIS AS A MASS TORT ACTION --

16 THE COURT: UM-HUM.

17 MR. GLACKIN: -- WHICH IS THAT WHETHER -- REGARDLESS
18 OF HOW THIS ACTION IS BROUGHT, THE PROOF IS GOING TO BE THE
19 SAME.

20 IF YOU -- IF MR. HARIHARAN CAME IN HERE AND TRIED TO
21 MAINTAIN AN INDIVIDUAL ACTION AGAINST THESE COMPANIES FOR THIS
22 VIOLATION, HE'D BE MAKING THE SAME ARGUMENTS AND ADVANCING THE
23 SAME PROOF ABOUT THE SEMI-RIGID JOB STRUCTURE AT THE FIRMS,
24 WHICH MEANT THAT ANY REACTION TO THIS INCREASED LEVEL OF
25 COMPETITION WAS GOING TO BE -- TO HAVE TO HAPPEN FIRM-WIDE.

1 SO THERE'S NO -- I MEAN, THIS IS WHERE WE KIND OF GET INTO
2 THE AMGEN AREA. YOU KNOW, WE ARE REQUIRED TO SHOW A PLAUSIBLE
3 METHODOLOGY FOR MOVING IMPACT. WE'VE --

4 THE COURT: WELL, THAT'S -- THAT'S FROM
5 JUDGE ILLSTON'S CASE, RIGHT, THE METHODOLOGY? WHAT, OTHER THAN
6 JUDGE ILLSTON'S CASE, SAYS PLAUSIBLE METHODOLOGY IS ENOUGH? IS
7 THERE ANYTHING ELSE?

8 MR. GLACKIN: I'D HAVE TO GO BACK -- I COULD LOOK AT
9 THE LCDS CASE AND SEE WHAT SHE'S CITING THERE. I THINK THERE
10 ARE A NUMBER OF CASES THAT HAVE USED THE PHRASEOLOGY PLAUSIBLE
11 METHODOLOGY FOR PROVING IMPACT.

12 THE COURT: AREN'T PEOPLE NOW SAYING SIGNIFICANT
13 PROOF?

14 MR. VAN NEST: UM-HUM.

15 MR. GLACKIN: NO, ABSOLUTELY NOT.

16 THE COURT: I WILL JUST TELL YOU, AS MUCH RESPECT AS
17 I HAVE FOR JUDGE ILLSTON, I WOULD FEEL RELUCTANT TO RELY ON A
18 DISTRICT COURT CASE THAT'S PRE-AMGEN, PRE-COMCAST, THAT WAS
19 AGGREGATED ON OTHER GROUNDS.

20 I DON'T KNOW. WAS HER CLASS CERT ISSUE ACTUALLY EVEN
21 REVIEWED BY THE CIRCUIT COURT?

22 MR. GLACKIN: WELL, A 23(F) POSITION WAS FILED. I
23 WROTE THE OPPOSITION.

24 SO, YEAH, I MEAN --

25 THE COURT: SO WAS IT --

1 MR. GLACKIN: A 23(F) PETITION WENT UP AND IT WAS
2 DENIED. THE PETITION PRESUMABLY WENT TO THE PANEL, THE MOTIONS
3 PANEL OF THE NINTH CIRCUIT.

4 THE COURT: UH-HUH.

5 MR. GLACKIN: AND THEY READ THE PETITION, THEY READ
6 OUR OPPOSITION, AND ABOUT 30 DAYS LATER THEY REJECTED THE
7 PETITION.

8 SO IF I -- IF I COULD ADDRESS THIS --

9 THE COURT: YOU MEAN REJECTED THE PETITION TO JUST
10 OVERTURN THE CLASS CERT DECISION?

11 MR. GLACKIN: CORRECT. WELL, THEY DENIED -- IT'S A
12 PETITION FOR REVIEW, AND THEN THEY COULD, I THINK IN THEORY,
13 REQUEST FURTHER BRIEFING OR THEY COULD DECIDE -- THEY COULD
14 DECIDE THE QUESTION BASED SIMPLY ON THE PETITION AND THE
15 RESPONSE, WHICH I THINK IS TOTALLY NORMAL.

16 BUT IN THE -- IN ANY EVENT, THEY DENIED THE PETITION IS
17 WHAT THEY DID.

18 THE COURT: BUT WHY SHOULD I USE THE PLAUSIBLE
19 METHODOLOGY? THAT SEEMS LIKE THAT'S A RISKY MOVE IN THIS
20 ENVIRONMENT WHEN ALL THE CASE LAW HAS BEEN CHANGING SO MUCH.

21 MR. GLACKIN: WELL, I THINK THAT THE -- THE
22 SIGNIFICANT PROOF STANDARD THAT -- THE SIGNIFICANT PROOF OR THE
23 CONVINCING PROOF STANDARD THAT'S BEEN CITED BY THE
24 DEFENDANTS --

25 THE COURT: YEAH.

1 MR. GLACKIN: -- IF YOU LOOK AND SEE WHERE THAT COMES
2 FROM, EVERY SINGLE TIME IT COMES FROM DUKES.

3 AND WHEN WE WERE HERE LAST TIME WE TALKED ABOUT THE FACT
4 THAT DUKES IS A CASE THAT'S ABOUT 23(A). AND IN DUKES THE
5 SUPREME COURT SAID THAT IF YOU ARE ARGUING THAT IT IS THE
6 ABSENCE OF A POLICY THAT HAS CAUSED HARM BY LEADING TO
7 DISCRIMINATION AGAINST A MILLION WORKERS AND THAT IS THE -- IT
8 IS THE ABSENCE OF THE POLICY THAT IS YOUR VIOLATION, AND IF
9 YOUR ONLY EVIDENCE THAT THIS IS TRULY A COMMON ISSUE IS
10 STATISTICAL PROOF, IF THIS IS THE ONLY EVIDENCE OF ANY COMMON
11 ISSUE IN THE CASE UNDER RULE 23(A), THEN THAT PROOF, THEY
12 USED -- IN ONE PLACE THEY USED STRONG PROOF, IN ANOTHER PLACE
13 THEY USED CONVINCING PROOF.

14 I THINK THE NINTH CIRCUIT, IN ELLIS VERSUS COSTCO,
15 ADDRESSING THE SAME QUESTION, USED THE PHRASE SIGNIFICANT
16 PROOF.

17 SO THAT IS THE STANDARD WHEN YOU HAVE -- WHEN YOU ARE
18 ASKING WHETHER THE ONLY QUESTION UNDER 23(A) THAT COULD
19 POSSIBLY BE COMMON IS REALLY COMMON WHEN THE ONLY EVIDENCE OF
20 IT IS STATISTICAL EVIDENCE.

21 THERE IS -- WE ARE -- WE CLEAR 23(A) BY A COUNTRY MILE.
22 THIS -- WHEN IT COMES TO RULE 23(A), THIS TRULY IS A TYPICAL
23 ANTITRUST CASE WHERE THERE IS A COMMON ISSUE, AN OVERWHELMING
24 COMMON ISSUE ABOUT WHETHER OR NOT THE DEFENDANTS VIOLATED THE
25 LAW.

1 AND THAT IS GOING TO BE -- THAT IS -- YOU KNOW, PERIOD,
2 FULL STOP.

3 THE COURT: BUT YOU'RE REALLY ASKING FOR
4 CERTIFICATION UNDER (B)(3); RIGHT?

5 MR. GLACKIN: CORRECT. BUT THE POINT IS THAT THE
6 DUKES CASE IS A CASE THAT'S ABOUT RULE 23(A) AND IT'S ABOUT
7 THIS UNUSUAL CIRCUMSTANCE WHERE THE ONLY POSSIBLE -- THE ONLY
8 COMMON -- I MEAN, THIS IS THE TRIAL THAT THE SUPREME COURT WAS
9 LOOKING AT, A TRIAL WHERE AN EXPERT WITNESS TAKES THE STAND AND
10 THE ONLY EVIDENCE OF A VIOLATION THAT IS COMPANY-WIDE IS
11 STATISTICAL, AND THAT IS THE ONLY COMMON ISSUE IN THE CASE.

12 AND AT THE TIME THE COMPANY HAS -- SHOULD, IN THEORY, HAVE,
13 AS A DEFENSE AGAINST THIS CASE, THE INDIVIDUAL DECISIONS OF THE
14 MANAGERS THAT ARE ALLEGED TO BE DISCRIMINATORY.

15 SO IN THAT SITUATION, THE SUPREME COURT SAID THAT WHEN YOU
16 HAVE -- AND THIS IS WHY DUKES HAS NOT, I MEAN, HAS NOT
17 MEANINGFULLY CHANGED THE LANDSCAPE. CERTAINLY IN ANTITRUST
18 CLASS CASES IT HAS NOT HAD A MEANINGFUL EFFECT, BECAUSE IN AN
19 ANTITRUST CASE, THE COMMON ISSUE IS SOMETHING WE BLOW BY VERY
20 QUICKLY AND THEY, IN FACT, CONCEDED THAT AT THE BEGINNING OF
21 THE FIRST ARGUMENT.

22 SO WHAT WE'RE ASKING IS WE'RE IN 23(B)(3), AND THE
23 QUESTION IS, HAVING OTHERWISE MET THE REQUIREMENTS FOR A CLASS
24 ACTION, SHOULD WE BE ALLOWED TO GO FORWARD WITH A DAMAGES CLASS
25 ACTION?

1 AND THERE THE STANDARD IS, HAVE WE ADVANCED A PLAUSIBLE
2 METHODOLOGY FOR PROVING IMPACT? AND THE REASON --

3 THE COURT: BUT YOU'RE GOING TO HAVE TO GIVE ME SOME
4 AUTHORITY, OTHER THAN THE LCD ORDER, FOR PLAUSIBLE METHODOLOGY.
5 DO YOU HAVE -- IS THERE ANYTHING ELSE?

6 MR. GLACKIN: WELL, I WOULD -- I WOULD RESPECTFULLY
7 SUBMIT THAT --

8 THE COURT: UH-HUH.

9 MR. GLACKIN: -- THE AMGEN CASE IS THE BEST AUTHORITY
10 FOR THIS POINT, BECAUSE WHAT THE SUPREME COURT SAYS IN AMGEN IS
11 THAT -- WHAT I THINK THE DEFENDANTS WANT YOU TO DO, WHICH IS
12 CALL A WINNER OR A LOSER ON THIS QUESTION OF WHETHER OR NOT
13 WE'VE PROVEN COMMON IMPACT, THAT IS EXACTLY WHAT THE COURT IS
14 NOT SUPPOSED TO DO.

15 THE COURT IS SUPPOSED TO SIMPLY INQUIRE WHETHER OR NOT THE
16 ISSUE IS COMMON. AND IF THE ISSUE IS COMMON, IF IT'S GOING TO
17 RISE OR FALL ON COMMON PROOF, THEN IT'S APPROPRIATE TO CERTIFY
18 A CLASS ACTION.

19 AND IT'S NOT APPROPRIATE FOR THE COURT TO WEIGH THE
20 INFERENCES THAT ARE BEING OFFERED BY THE PARTIES.

21 THE COURT: LET ME ASK YOU TO COMMENT ON
22 MR. VAN NEST'S SUGGESTION ABOUT THE MASS TORT BELLWETHER MODEL.
23 HOW WOULD THAT -- I GUESS I'M JUST NOT CLEAR. IF YOU'RE
24 SAYING, OBVIOUSLY THIS IS YOUR DEFAULT, DEFAULT, DEFAULT,
25 DEFAULT POSITION, JUST CERTIFY A CLASS ON ANTITRUST LIABILITY,

1 HOW WOULD THAT PLAY OUT? WE'RE GOING TO HAVE, WHAT, INDIVIDUAL
2 TRIALS ON INDIVIDUAL IMPACT AND DAMAGES? OR WHAT?

3 MR. GLACKIN: WELL, THIS IS -- I MEAN, THIS IS
4 EXACTLY WHY IT WOULD BE, I THINK, THE WRONG -- BECAUSE, OKAY,
5 TO TELL YOU HOW IT WOULD PLAY OUT --

6 THE COURT: YEAH.

7 MR. GLACKIN: -- IN THE HYPOTHETICAL SCENARIO WHERE
8 THAT HAPPENED --

9 THE COURT: UM-HUM.

10 MR. GLACKIN: -- WE WOULD HAVE THE TRIAL ON
11 LIABILITY, THAT WOULD HAPPEN. AND THEN WE WOULD BRING -- I
12 GUESS WE WOULD BRING IN THE EMPLOYEES OF THESE COMPANIES ONE AT
13 A TIME TO PROVE IMPACT.

14 BUT IN EVERY SINGLE CASE, THE PROOF OF IMPACT WOULD BE THE
15 OPINION THAT THIS CONDUCT, THAT THIS CONDUCT AFFECTED THE PAY
16 STRUCTURE OF THE ENTIRE COMPANY.

17 AND I DON'T -- YOU KNOW, WE'RE NOT ASKING FOR THAT KIND OF
18 A CLASS TO BE CERTIFIED. I SEE NO WAY TO PROSECUTE THE CASE
19 THAT WAY, FRANKLY. IT MAKES ABSOLUTELY NO SENSE.

20 THE COURT: ALL RIGHT. SO IF I'M NOT GOING TO -- SO
21 THEN YOU WOULDN'T WANT A CLASS CERTIFIED JUST BASED ON
22 ANTITRUST LIABILITY?

23 MR. GLACKIN: NO, BECAUSE I CAN'T -- I REALLY CAN'T
24 SEE A PLAN AFTER THAT THAT WOULD MAKE ANY SENSE, JUST LIKE I
25 CAN'T SEE HOW A MASS TORT PLAN WOULD MAKE ANY SENSE, BECAUSE

1 THE WHOLE POINT HERE THAT WE ESTABLISHED WITH MR. MITTELSTAEDT
2 AT THE FIRST HEARING IS THAT WE'RE NEVER GOING TO KNOW WHO
3 WOULD HAVE GOTTEN THE COLD CALLS. WE'RE NEVER GOING TO KNOW
4 WHICH SPECIFIC JOB TITLES WOULD HAVE GOTTEN THE WAVES OF -- THE
5 COLD CALLS FROM THE 800 GOOGLE RECRUITERS. WE'LL NEVER KNOW
6 BECAUSE IT DIDN'T HAPPEN. SO WE CAN NEVER TRACE OUT, YOU KNOW,
7 THE IMPACT FROM THE COLD CALL THAT DIDN'T HAPPEN BECAUSE WE
8 DON'T KNOW WHERE THAT COLD CALL WENT.

9 AND THAT'S WHY THE DEFENDANTS WANT THIS STANDARD. IF THE
10 STANDARD IS WE HAVE TO SHOW -- THAT WE HAVE TO PROVE THAT A
11 COLD CALL HAPPENED, WOULD HAVE HAPPENED TO A SPECIFIC PERSON
12 AND SHOW THE PROPAGATION OUTWARD FROM THAT COLD CALL, I MEAN,
13 WE CAN'T WIN. I MEAN, WE MIGHT AS WELL GO HOME, AND THAT'S WHY
14 THAT STANDARD IS SO FAVORABLE TO THEM.

15 THE COURT: WELL, LAST TIME WHEN WE HAD SEVEN
16 DEFENDANTS, THE PARTIES PREDICTED THAT THE TRIAL WOULD BE 17
17 DAYS. WHAT IS IT NOW THAT IT'S MINUS LUCASFILM, PIXAR, AND
18 INTUIT?

19 MR. GLACKIN: I'M THINKING. I MEAN, I WOULD IMAGINE
20 THAT THE PLAINTIFFS' CASE PROBABLY COULD BE PUT ON IN SOMETHING
21 LIKE SIX OR SEVEN TRIAL DAYS, MAYBE EIGHT OR NINE. I DON'T
22 KNOW. I'M A LITTLE HESITANT.

23 I WOULD IMAGINE THAT THE REDUCTION IN THE NUMBER OF
24 DEFENDANTS WOULD MEAN THAT YOU WOULD HAVE, YOU KNOW, FEWER
25 DEFENDANTS WHO WANTED TO PUT ONE OR TWO CORPORATE

1 REPRESENTATIVES ON THE STAND TO SAY EITHER THAT THEY DIDN'T DO
2 ANYTHING WRONG OR THE AGREEMENTS NEVER WOULD HAVE HAD THIS
3 IMPACT.

4 SO I WOULD SUSPECT THAT ON THE DEFENSE SIDE, THE BACK END
5 WOULD GET LOWER. I THINK OUR CASE IS KIND OF THE SAME NO
6 MATTER WHAT.

7 THE COURT: WHAT ABOUT FOR THE DEFENDANTS? WHAT IS
8 THE NEW ESTIMATED TRIAL LENGTH?

9 MR. VAN NEST: I HAVEN'T THOUGHT THAT THROUGH
10 CAREFULLY ENOUGH, YOUR HONOR.

11 BUT I WOULD SAY, I THINK IT DOES MATTER. IF THE EVIDENCE
12 FOR LUCASFILM AND PIXAR AND INTUIT IS OUT, WHICH I THINK IT
13 SHOULD BE, THEN ARGUABLY WE COULD DO IT IN LESS TIME. I THINK
14 THAT'S CLEARLY RIGHT.

15 AND IF -- IF THEY'RE SAYING THEY WANT TO PROVE JUST EXACTLY
16 WHAT THEY STARTED OFF WITH, THEN I DON'T THINK THE TIME
17 SHRINKS.

18 BUT IN MY VIEW, THE EVIDENCE AFFECTING THOSE COMPANIES IS
19 DIFFERENT AND NOT REALLY RELATED ANYMORE AND IT WOULD BE A
20 LITTLE SHORTER.

21 I --

22 THE COURT: LET ME --

23 MR. VAN NEST: OH, SORRY.

24 THE COURT: LET ME HEAR FROM MR. GLACKIN. FOR
25 YOUR -- TELL ME HOW YOUR CASE AT TRIAL WOULD LOOK. HOW WOULD

1 IT BREAK DOWN BETWEEN LIABILITY VERSUS IMPACT VERSUS DAMAGES?

2 MR. GLACKIN: WELL, I CAN TELL YOU THAT, HAVING DONE
3 ONE OF THESE CASES, THAT THE IMPACT AND DAMAGES PART OF THE
4 CASE IS NOT GOING TO TAKE A LOT OF TIME. I MEAN, WE -- WE
5 SPEND A LOT OF TIME ON THOSE ISSUES AT CLASS CERTIFICATION, BUT
6 AT TRIAL, THE DIRECT EXPERT TESTIMONY ON THOSE POINTS WILL BE
7 OVER IN TWO TO THREE HOURS I WOULD SUSPECT ON IMPACT AND
8 DAMAGES.

9 AND THEN I WOULD SUSPECT THAT THE DEFENDANTS ARE GOING TO
10 HAVE AT LEAST ONE OR POSSIBLY TWO ECONOMETRICIANS WHO WILL COME
11 IN AND SAY THAT OUR ECONOMETRICIAN IS WRONG.

12 YOU KNOW, THIS CASE -- I SUPPOSE I MIGHT HAVE TO EXPAND
13 THAT ESTIMATE A BIT IF WE'RE GOING TO HAVE EXPERT TESTIMONY --
14 IF WE'RE BUILDING INTO THAT CATEGORY EXPERT TESTIMONY ABOUT
15 THESE COMPANIES' COMPENSATION STRUCTURES.

16 BUT, AGAIN, IT'S NOT A BIG PART OF THE CASE. MOST OF THE
17 CASE WILL BE ABOUT THE AGREEMENTS AND THE, THE SUBJECTIVE
18 INTENT OF THE PEOPLE WHO REACHED THEM.

19 BY THE WAY, I HAVE --

20 MR. VAN NEST: I HAVE A DIFFERENT VIEW, OBVIOUSLY,
21 YOUR HONOR, ON A NUMBER OF THESE POINTS.

22 MR. GLACKIN: I HAVE A PLAUSIBLE METHODOLOGY CASE FOR
23 YOU, YOUR HONOR.

24 THE COURT: ALL RIGHT. WHAT'S THAT?

25 MR. GLACKIN: I'D OFFER YOU THE GPUS DECISION, WHICH

1 WE QUOTED IN OUR BRIEF, AND I WOULD ACTUALLY OFFER THE PASSAGE
2 THAT WE QUOTED, I THINK IN OUR REPLY BRIEF, WHICH SAYS --

3 THE COURT: YOU KNOW, I FEEL SOMEWHAT HESITANT ON
4 RELYING ON ANY DISTRICT COURT CASE THAT WAS BEFORE THE SUPREME
5 COURT CASES. I MEAN, OBVIOUSLY THEY'RE -- WE MAY HAVE TO JUST
6 BECAUSE THEY MAY ADDRESS ISSUES THAT ARE MORE ON POINT.

7 BUT ANYWAY, GO AHEAD. SO YOU WANTED GPU, JUDGE ALSUP'S
8 DECISION.

9 MR. GLACKIN: JUDGE ALSUP'S DECISION, WHICH IS THE
10 AUTHORITY THAT THE DEFENDANTS HAVE -- I MEAN, WE BLOCK QUOTED
11 THIS IN OUR BRIEF. WHEN HE -- WHEN HE RULED THAT WHAT THE
12 PLAINTIFFS DID IN THAT CASE WASN'T ENOUGH, HE WAS CAREFUL TO
13 QUALIFY IT BY SAYING, "THIS ORDER AGREES THAT SUCH METHODS WERE
14 PLAUSIBLY RELIABLE, SHOULD BE ALLOWED AS A MEANS OF COMMON
15 PROOF. TO RULE OTHERWISE WOULD ALLOW ANTITRUST VIOLATORS A
16 FREE PASS IN MANY INDUSTRIES."

17 THE COURT: ALL RIGHT. LET ME ASK MY QUESTION. LET
18 ME ASK MR. VAN NEST, AND I THINK WE'RE GETTING -- WE'VE BEEN
19 GOING ALMOST AN HOUR AND A HALF.

20 (DISCUSSION OFF THE RECORD BETWEEN THE COURT AND THE COURT
21 REPORTER.)

22 THE COURT: LET'S GO A LITTLE BIT MORE AND THEN WE'LL
23 HAVE TO TAKE A BREAK.

24 LET ME ASK MR. VAN NEST, IT SEEMS -- IT SEEMS LIKE THE
25 DEFENDANTS ARE ARGUING THAT IT'S NOT ENOUGH THAT THERE ARE

1 COMMON QUESTIONS, BUT THAT THE RESULT HAS TO BE THE SAME FOR
2 ALL 60,000 CLASS MEMBERS.

3 DO YOU WANT TO COMMENT ON THE WHOLE SORT OF COMMON QUESTION
4 VERSUS COMMON ANSWERS --

5 MR. VAN NEST: SURE.

6 THE COURT: -- ISSUE AND WHAT'S REQUIRED BY THE CASE
7 LAW --

8 MR. VAN NEST: YEAH.

9 THE COURT: -- CURRENTLY?

10 MR. VAN NEST: ABSOLUTELY, YOUR HONOR.

11 THAT'S NOT WHAT WE'RE ARGUING. WE'RE ARGUING -- WE'RE
12 FOLLOWING UP ON WHAT YOU SAID LAST TIME, WHICH IS THAT IF YOU
13 WANT TO PROCEED AS A CLASS, A (B)(3) CLASS WHERE PEOPLE ARE
14 GOING TO GET DAMAGES, AND YOU WANT TO DO IT IN ONE BIG TRIAL,
15 YOU HAVE TO SHOW THAT ALL OR NEARLY ALL OF THE CLASS MEMBERS
16 WERE IMPACTED, BECAUSE IMPACT IS AN ELEMENT OF LIABILITY.

17 THAT'S THE WHOLE POINT. IN AN ANTITRUST CASE, WHETHER THEY'RE
18 IMPACTED IS NECESSARY TO ESTABLISH LIABILITY.

19 SO IF WE'RE GOING TO DO IT FOR A CLASS, THE RULE IS -- AND
20 THIS IS WHAT JUDGE ALSUP SAID IN GPU AND JUDGE GRADY SAID IN
21 REED -- YOU HAVE TO SHOW THAT ALL OR NEARLY ALL MEMBERS OF THE
22 CLASS WERE IMPACTED.

23 AND YOU SAID THAT LAST TIME, TOO. THAT'S THE ASSIGNMENT
24 YOU GAVE US.

25 NOW, IN ORDER TO SHOW THAT, YOU'RE QUITE RIGHT, THERE'S

1 NO -- NO LONGER IS A PLAUSIBLE THEORY ENOUGH. COMCAST CHANGED
2 THAT, DUKES CHANGED THAT, AND ELLIS IN THE NINTH CIRCUIT
3 CHANGED THAT.

4 AND YOU SAID -- YOU GOT IT RIGHT AT PAGE 16 OF YOUR ORDER
5 WHERE YOU SUMMARIZE ALL OF THIS. YOU SAID, "I'M NOT GOING TO
6 RELY ON PLAUSIBLE THEORIES. I THINK YOU HAVE TO CONDUCT A
7 THOROUGH REVIEW OF THEIR THEORY AND YOU HAVE TO DO A RIGOROUS
8 EVALUATION AND ANALYSIS TO SEE IF THIS IS REALLY PERSUASIVE."

9 AND WHAT YOU SAID LAST TIME WAS, "IF YOU GUYS WANT TO
10 CERTIFY A CLASS, YOU HAVE TO SATISFY TWO REQUIREMENTS. YOU
11 HAVE TO SHOW THAT THE COMP STRUCTURES WERE SO RIGID THAT IMPACT
12 ON SOME WOULD AFFECT EVERYBODY, OR NEARLY EVERYBODY; AND YOU
13 HAVE TO SHOW THAT YOUR CLASS IS NARROWLY DRAWN SO THERE AREN'T
14 A WHOLE LOT OF PEOPLE IN IT THAT WEREN'T IMPACTED AT ALL AND
15 WEREN'T INJURED AND DAMAGED," AND THEY FLUNKED ON BOTH OF THOSE
16 UNDER ANY STANDARD.

17 REMEMBER, UNDER THE STANDARD THAT JUDGE ALSUP APPLIED IN
18 GPU, HE DENIED CERT EVEN THERE.

19 THEY FAILED TO SHOW THAT THE SALARY STRUCTURES ARE SO RIGID
20 THAT WHATEVER HAPPENED WHEN PEOPLE DIDN'T GET CALLS WOULD
21 PROPAGATE.

22 AND AS I POINTED OUT, TAB 1 AND TAB 2, DR. LEAMER ADMITS
23 THAT HE CAN'T MAKE THAT SHOWING AND HE DOESN'T THINK IT'S TRUE.

24 SO IF THAT'S THE CASE, NOW WE'RE LOOKING AT, OKAY, WHAT DO
25 WE HAVE? DO WE HAVE SOME TITLES THAT -- WHERE WE CAN SHOW

1 PROPAGATION EVEN WITHIN A TITLE?

2 AND THE ANSWER TO THAT IS THE MURPHY EXHIBITS SHOWING LOTS
3 OF VARIATION IN THE SAME JOB TITLE YEAR IN AND YEAR OUT AT
4 EVERY ONE OF THE DEFENDANTS.

5 SO THERE ISN'T A RIGID WAGE STRUCTURE, AND --

6 THE COURT: YOU KNOW, LAST TIME AROUND YOU ALL
7 WEREN'T EVEN REALLY CHALLENGING LIABILITY, SO --

8 MR. VAN NEST: WELL, BUT -- NO, WE WERE CHALLENGING
9 THE SAME THING.

10 THE COURT: BUT --

11 MR. VAN NEST: IMPACT IS --

12 THE COURT: WELL, I MEAN, NO. YOU BASICALLY SORT OF
13 CONCEDED LIABILITY LAST TIME.

14 MR. VAN NEST: NO. WHAT WAS --

15 THE COURT: SO I'M CURIOUS, NOW YOU'RE SAYING, "OH,
16 NO, NO. LET'S GO BACK" --

17 MR. VAN NEST: NO.

18 THE COURT: -- "AND LIABILITY AND IMPACT IS PART OF
19 LIABILITY," BUT YOU ESSENTIALLY CONCEDED THAT POINT LAST TIME.

20 MR. VAN NEST: NO, NO. WHAT WAS SAID LAST TIME, YOUR
21 HONOR, IS -- YOU JUST INVITED THEM, DO THEY WANT TO HAVE A
22 CLASS CERTIFIED OVER WHETHER THERE WAS A CONSPIRACY TO IMPACT
23 WAGES, ET CETERA, ET CETERA.

24 AND THEY DON'T WANT THAT. THEY WANT -- THEY WANT THE WHOLE
25 KAHUNA. THEY WANT EVERYTHING IN ONE TRIAL.

1 FAIR ENOUGH. FAIR ENOUGH.

2 IF THEY WANT -- WHAT WE SAID LAST TIME WAS WE'RE NOT
3 CHALLENGING THAT PROOF OF THE CONSPIRACY IS NOT COMMON. THAT'S
4 COMMON. WE SAID THAT'S A COMMON ISSUE.

5 BUT THAT DOES NOT ENTITLE YOU TO CERTIFICATION BECAUSE YOU
6 HAVE TO SHOW THAT COMMON ISSUES PREDOMINATE, AND THE BIG ISSUE
7 FOR THEM IS GOING TO BE -- AND BELIEVE ME, IT'S NOT A COUPLE
8 HOURS -- THE HUGE ISSUE IN THIS CASE IS GOING TO BE, GIVEN THE
9 NATURE OF WHAT THEY'RE ALLEGING, CAN THEY SHOW IMPACT TO ALL OR
10 NEARLY ALL MEMBERS OF THE CLASS?

11 THAT'S GOING TO REQUIRE TESTIMONY FROM THE H.R. PEOPLE AT
12 EVERY SINGLE DEFENDANT. IT'S GOING TO REQUIRE TESTIMONY FROM
13 EXPERTS ABOUT WHAT THE DEFENDANTS' PAY STRUCTURES AND PRACTICES
14 WERE. THERE'S GOING TO BE TESTIMONY FROM EACH COMPANY ABOUT
15 WHAT THEY DID AND WHY. IT'S NOT JUST PUTTING A COUPLE OF
16 EXPERTS UP TO TALK ABOUT THE BIG PICTURE.

17 THE JURY WOULD HAVE TO KNOW, BECAUSE YOU'RE TALKING ABOUT
18 THIS MANY EMPLOYEES, HOW DO THESE COMPANIES MANAGE H.R.? WHAT
19 DID THEY LOOK AT? HOW MUCH VARIATION WAS THERE?

20 WE WILL PROBABLY BE CALLING MANAGERS TO SAY, "I WOULD
21 NEVER RAISE THE SALARY OF EVERYBODY IN MY UNIT BECAUSE I'VE GOT
22 TO PROTECT MY TOP PERFORMER. I'D RUN OUT OF BUDGET. THAT
23 WOULD BE CRAZY."

24 AND THERE'S NO EVIDENCE THAT ANYBODY EVER DID THAT.

25 ALL THE EVIDENCE IS THAT IF YOU HAVE SOMEBODY THAT'S A

1 HIGH PERFORMER YOU HAVE TO PROTECT, THEY GET A BIG SALARY
2 SPIKE, JUST LIKE TAB 4 AND TAB 5 SHOW.

3 AND SO THE BIG ISSUE THAT WE UNDERSTOOD FROM YOUR HONOR'S
4 ORDER, ONE OF THE BIG ISSUES THAT WAS LEFT OVER WAS, CAN THEY
5 SHOW IMPACT ON A CLASS-WIDE BASIS?

6 THAT'S WHY, IN MY VIEW, A --

7 THE COURT: SO DO YOU BELIEVE THAT THE TEST RIGHT NOW
8 IS JUST WHETHER COMMON QUESTIONS PREDOMINATE FOR A 23(B)(3)
9 CLASS --

10 MR. VAN NEST: YOU HAVE --

11 THE COURT: -- TO BE CERTIFIED?

12 MR. GLACKIN: ARE YOU POSITING THAT TO ME OR TO HIM?

13 THE COURT: TO MR. VAN NEST.

14 MR. VAN NEST: FOR A (B)(3) CLASS --

15 THE COURT: YES.

16 MR. VAN NEST: -- YOU HAVE TO SHOW THAT COMMON
17 QUESTIONS PREDOMINATE AND THAT THERE IS, THAT THERE IS A THEORY
18 THAT PASSES A RIGOROUS ANALYSIS BASED ON RELIABLE EVIDENCE THAT
19 THERE WAS IMPACT TO ALL OR NEARLY ALL MEMBERS OF THE CLASS.

20 IF YOU DON'T HAVE THAT, THEN YOU CAN PROCEED WITH
21 BELLWETHER TRIALS, CERTAINLY, AND WITH A BELLWETHER TRIAL --

22 THE COURT: AND YOU'RE RELYING, FOR THAT SECOND HALF,
23 SEPARATE FROM WHETHER COMMON QUESTIONS PREDOMINATE, JUST ON MY
24 ORDER? THAT'S WHAT YOU'RE BASING IT ON?

25 MR. VAN NEST: I'M RELYING PRIMARILY ON YOUR ORDER.

1 BUT THAT'S WHAT JUDGE ALSUP AND JUDGE GRADY, ALL THESE
2 CASES -- THE WHOLE POINT --

3 THE COURT: WHAT ARE YOU RELYING ON FOR YOUR
4 SECOND -- ARTICULATE THE SECOND HALF --

5 MR. VAN NEST: THE SECOND HALF --

6 THE COURT: -- OF WHAT YOU BELIEVE THE STANDARD TO
7 BE.

8 MR. VAN NEST: I BELIEVE THE STANDARD IS THAT THE
9 PLAINTIFFS HAVE TO SHOW THAT THEY CAN PROVE, BY COMMON
10 EVIDENCE, THAT THERE WAS CLASS-WIDE IMPACT, AND I'LL CITE
11 COMCAST FOR THAT, I'LL CITE AMCHEM FOR THAT, I'LL CITE REED FOR
12 THAT, I'LL CITE GPU FOR THAT.

13 ALL THESE CASES SAY THAT YOU HAVE TO BE ABLE TO PROVE, FOR
14 A (B)(3) CLASS -- WHICH IS A HIGHER STANDARD, BY THE WAY, THAN
15 JUST A 23(A) -- YOU HAVE TO PROVE THAT THERE WAS IMPACT,
16 CLASS-WIDE IMPACT AS PART OF YOUR ANTITRUST CLAIM.

17 AND THEY DIDN'T DISAGREE WITH THAT.

18 THE COURT: SO YOUR STANDARD IS COMMON EVIDENCE TO
19 PROVE CLASS-WIDE IMPACT?

20 MR. VAN NEST: RIGHT.

21 THE COURT: OKAY. BECAUSE YOU HAD OTHER EXTRA
22 ADVERBS AND ADJECTIVES IN THERE EARLIER.

23 MR. VAN NEST: WELL, I'M -- WHAT YOU -- THE WAY YOU
24 DESCRIBED IT IN THE ORDER, YOU DESCRIBED IT AS PROVING THAT
25 THERE WAS IMPACT TO ALL OR NEARLY ALL MEMBERS OF THE CLASS.

1 THAT'S WHAT YOU SAID IN YOUR ORDER.

2 AND I WOULD AGREE WITH THAT. THAT'S WHAT THESE CASES ALL
3 REQUIRE WHEN THEY SAY YOU HAVE TO HAVE PROOF OF CLASS-WIDE
4 IMPACT.

5 AND YOU CAN SEE -- PAGE 43 OF YOUR ORDER IS WHAT I'M
6 DRAWING ON. PAGE 36 TO THE SAME EFFECT. THAT'S WHAT -- THAT'S
7 THE STANDARD YOU SET UP AND THAT'S THE STANDARD THAT APPLIES.

8 AND THEY HAVEN'T MET IT. THEY HAVEN'T MET IT BECAUSE
9 DR. LEAMER ADMITS THAT HE CAN'T SAY THAT THE SALARY STRUCTURES
10 WERE SO RIGID THAT CHANGES TO SOME WOULD HAVE TRANSLATED INTO
11 CHANGES FOR ALL.

12 AND THE RAW DATA THAT WE'VE PRESENTED AND THAT DR. MURPHY
13 ANALYZED PROVES IT AGAIN, NAMELY, THERE'S HUGE VARIATION AND
14 FLEXIBILITY IN PAY AND IT'S BASED ON INDIVIDUAL FACTORS.

15 AND WHAT DR. SHAW DID, OUR ECONOMIST FROM STANFORD -- SHE
16 HAS BEEN IN SILICON VALLEY FOR THE PAST 20 YEARS TALKING TO
17 H.R. PEOPLE, AND SHE SAYS THE DATA THAT COMES OUT OF THESE
18 COMPANIES IS CONSISTENT WITH THE PREVAILING PRINCIPLE IN
19 SILICON VALLEY, PAY FOR PERFORMANCE. PAY FOR PERFORMANCE.
20 THESE ARE ENTREPRENEURIAL COMPANIES. THEY ARE CUTTING EDGE.
21 THEY ARE NOT LOCKSTEP. THEY ARE NOT LABOR. THEY ARE NOT, YOU
22 KNOW, GOVERNED BY COLLECTIVE BARGAINING AGREEMENTS WHERE
23 EVERYTHING IS IN SOME KIND OF A SCHEDULE. IT'S PAY FOR
24 PERFORMANCE, AND THE DATA PROVES THAT.

25 AND GIVEN THAT THAT'S THE CASE, WE'RE BETTER OFF TRYING A

1 HANDFUL -- AND I MEAN A HANDFUL -- OF CASES WHERE AN INDIVIDUAL
2 PLAINTIFF COMES IN AND SAYS, "I WAS AT COMPANY A AND COMPANY A
3 HAD AN AGREEMENT WITH COMPANY B AND I AND MANY OTHERS WERE
4 PRIME PERFORMING CANDIDATES THAT WOULD HAVE GOTTEN COLD CALLS
5 AND HERE'S HOW I WAS INJURED. I WOULD HAVE GOTTEN A CALL, MY
6 PAY WOULD HAVE GONE UP," AND SO ON AND SO FORTH.

7 THAT'S GOING TO BE A BETTER WAY TO RESOLVE THIS CASE THAN
8 SOME TRIAL, WHICH THEY HAVEN'T ESTABLISHED A BASIS FOR, WHERE
9 THEY TRY TO PROVE CLASS-WIDE IMPACT ACROSS THE WHOLE CLASS WITH
10 COMMON EVIDENCE.

11 AND YOUR HONOR, IT'S --

12 THE COURT: YOU KNOW, I'M LOOKING AT THE DEFENDANTS'
13 ADMINISTRATIVE MOTION TO CONSIDER WHETHER CASES SHOULD BE
14 RELATED FILED ON JULY 19TH OF 2011, AND THE DEFENDANTS IN THIS
15 CASE BASICALLY SAID, "THESE CASES INVOLVE THE SAME ALLEGED
16 CLASS, SAME FACTUAL ALLEGATIONS, SAME CLAIMS FOR RELIEF.
17 BECAUSE THE CASES INVOLVE SUBSTANTIALLY THE SAME PARTIES,
18 EVENTS, AND ALLEGATIONS, AND BECAUSE IT APPEARS LIKELY THAT
19 THERE WILL BE AN UNDULY BURDENSONE DUPLICATION OF LABOR AND
20 EXPENSE OR CONFLICTING RESULTS IF THEY ARE HEARD BEFORE
21 DIFFERENT JUDGES, DEFENDANTS BELIEVE THEY ARE RELATED WITHIN
22 THE MEANING OF THE RELATED CASE."

23 MR. VAN NEST: I'LL STAND BY EVERY WORD OF THAT.

24 THE COURT: THERE WAS A TIME WHERE YOU ALL WANTED ALL
25 THIS CONSOLIDATED BECAUSE YOU CONCEDED THAT, FOR PURPOSES OF

1 ADMINISTRATION, IT MADE MUCH MORE SENSE --

2 MR. VAN NEST: IT DOES.

3 THE COURT: -- TO HAVE THESE TOGETHER.

4 MR. VAN NEST: ABSOLUTELY. AND I'M NOT SAYING

5 ANYTHING DIFFERENT TODAY, YOUR HONOR.

6 THE COURT: UM-HUM.

7 MR. VAN NEST: THERE'S NO -- WE WOULDN'T WANT FIVE
8 JUDGES DECIDING THE ISSUE THAT YOUR HONOR IS EVALUATING NOW,
9 AND WE WOULDN'T WANT FIVE JUDGES HANDLING THE CASE, NO MATTER
10 HOW WE DID IT, BECAUSE AS WE SAID LAST TIME, IF THEY'RE GOING
11 TO PROVE A CONSPIRACY, THAT EVIDENCE IS COMMON TO EVERYONE.

12 RIGHT? THAT'S WHAT WE'RE SAYING IS THAT THE PROOF OF PART ONE
13 OF THIS WHERE YOU HAVE TO SHOW THAT SOMEBODY CONSPIRED TO DO
14 SOMETHING, THAT IS COMMON AND THEY INTEND TO PROVE THAT IN A
15 COMMON WAY. WE GET THAT.

16 NOW, YOU OFFERED THEM CERTIFICATION ON THAT AND THEY DON'T
17 WANT IT. THEY DON'T WANT THAT. THEY DON'T WANT THAT BECAUSE
18 THEY WANT TO PUT 60,000 PEOPLE IN A CLASS AND START THROWING
19 SOME HUGE NUMBERS AROUND, WHICH IS WHAT THEY'RE DOING.

20 AND WHAT WE'RE SAYING IS YOU HAVEN'T ESTABLISHED THE
21 PREDICATE FOR THAT BECAUSE YOU HAVEN'T --

22 THE COURT: OKAY. LET ME INTERRUPT YOU ONE SECOND,
23 PLEASE.

24 MR. VAN NEST: SURE.

25 THE COURT: LET ME ASK MR. GLACKIN --

1 MR. GLACKIN: I HAVE A FEW WORDS ABOUT THE LEGAL
2 STANDARD I THINK YOU'RE MULLING OVER, IF I COULD RESPOND TO
3 THAT BRIEFLY.

4 THE COURT: GO AHEAD, PLEASE.

5 MR. GLACKIN: SO FIRST I'D OFFER YOU ANOTHER DISTRICT
6 COURT CASE, WHICH IS PRE-AMGEN, OF COURSE, BUT I BELIEVE IT'S
7 POST-DUKES --

8 THE COURT: OKAY.

9 MR. GLACKIN: -- WHICH IS THE IN RE: RAIL FREIGHT
10 DECISION OUT OF THE DISTRICT OF COLUMBIA, WHICH IS 2012 WL,
11 WEST LAW, 2870207 AT STAR 60.

12 THE COURT: 2870207?

13 MR. GLACKIN: 2870207, CORRECT.

14 THE COURT: OKAY.

15 MR. GLACKIN: AND I THINK THE URETHANES CASE THAT WE
16 CITED IN OUR MOST RECENT BRIEF, WHICH WAS A CASE IN WHICH THE
17 COURT, AFTER TRIAL, CONSIDERED A REQUEST TO DECERTIFY A CLASS
18 POST-COMCAST AND AMGEN -- I ALWAYS MIX UP AMCHEM AND AMGEN --
19 POST-AMGEN AND COMCAST WOULD ALSO BE INSTRUCTIVE, AND IT WOULD
20 SEE -- YOU WOULD SEE A DISTRICT COURT IN AN ANTITRUST CASE
21 APPLYING THOSE NEW CASES AND DENYING A MOTION TO DECERTIFY A
22 CLASS.

23 THE COURT: WHICH CASE IS THAT?

24 MR. GLACKIN: THAT IS -- IT'S IN OUR MOST RECENT
25 REPLY BRIEF, IN RE: URETHANE ANTITRUST LITIGATION, 2013 U.S.

1 DIST LEXIS, IT'S THE LEXIS CITE, 69784.

2 AND IF I COULD SAY JUST ONE MORE THING? I MEAN, WHAT I
3 UNDERSTAND YOUR HONOR TO BE GRAPPLING WITH A LITTLE BIT HERE IS
4 THE STRONG PROOF, CONVINCING PROOF VERSUS A COMMON QUESTION IS
5 ENOUGH REGARDLESS OF WHETHER OR NOT THE ANSWER TO THE COMMON
6 QUESTION IS YES OR NO.

7 THE COURT: UM-HUM.

8 MR. GLACKIN: AND WHAT I WOULD POINT OUT IS THAT IF
9 DUKES WAS ABOUT THE 23(B)(3) STANDARD, YOU COULD NOT RECONCILE
10 IT WITH AMGEN. THE CASES SAY VERY DIFFERENT THINGS ABOUT WHAT
11 THE PLAINTIFFS HAVE TO DO, AND THE REASON IS THAT DUKES IS A
12 CASE ABOUT -- IN THE CIRCUMSTANCES I DESCRIBED, WHICH I WON'T
13 REPEAT, AND AMGEN IS A CASE THAT'S ACTUALLY ABOUT RULE
14 23(B)(3).

15 SO I THINK THAT, YOU KNOW, THE LIGHT HERE IN TERMS OF WHAT
16 SHOULD BE FOLLOWED IN DECIDING WHETHER OR NOT WE'VE MET THE
17 STANDARD OF RULE 23(B)(3), WHICH IS PREDOMINANCE OF COMMON
18 QUESTIONS, IS AMGEN. IT'S CLEARLY AMGEN AND IT'S CLEARLY NOT
19 DUKES.

20 SO, YOU KNOW, I THINK THAT -- I WOULD JUST POINT OUT THAT
21 IF THE DEFENDANTS ARE RIGHT AND DUKES IS A 23(B)(3) CASE, THE
22 SUPREME COURT IN AMGEN WOULD HAVE HAD TO OVERTURN IT BECAUSE
23 YOU CAN'T RECONCILE THOSE TWO STANDARDS.

24 THE COURT: LET ME ASK, YOU KNOW, THE CASES -- THE
25 AMOUNT OF DOCUMENTARY EVIDENCE IN THIS CASE IS SIGNIFICANTLY

1 GREATER, I THINK, THAN PRETTY MUCH ANY OF THE OTHER CASES. YOU
2 KNOW, FOR EXAMPLE, IN DUKES THEY HAD SOME ANECDOTAL EVIDENCE OF
3 DISCRIMINATION FROM, WHAT, 200 -- 120 WOMEN. THEY HAD
4 STATISTICAL EVIDENCE AND THEN THEY HAD A SOCIOLOGIST TALK ABOUT
5 WAL-MART CULTURE.

6 WE DON'T HAVE THAT SITUATION.

7 MR. GLACKIN: CORRECT.

8 THE COURT: WE HAVE A POLICY, A SPECIFIC CONTRACTUAL
9 POLICY AMONGST THE DEFENDANTS.

10 MR. GLACKIN: CORRECT.

11 THE COURT: WE'RE JUST NOT -- IF YOU LOOK AT THE
12 OTHER CASES, THEY JUST DON'T HAVE THIS LEVEL OF DOCUMENTARY
13 EVIDENCE.

14 MR. GLACKIN: I MEAN, IF --

15 THE COURT: SO WHAT IS THE SIGNIFICANCE OF THE
16 STATISTICAL EVIDENCE? HOW IMPORTANT IS IT IN A CASE THAT HAS
17 THIS MUCH DOCUMENTARY EVIDENCE?

18 MR. GLACKIN: WELL, I THINK THAT IT IS OF MUCH LESS
19 IMPORTANCE.

20 AND, YOU KNOW, AS AN EXERCISE, BECAUSE I WAS INTERESTED,
21 BEFORE WE CAME DOWN HERE I ASKED MY PARTNER, MR. HARVEY, TO
22 PULL THE EXPERT REPORTS IN GPUS, BECAUSE I WAS CURIOUS TO SEE
23 EXACTLY WHAT HAD HAPPENED BECAUSE JUDGE ALSUP'S OPINION IS A
24 LITTLE AMBIGUOUS. AND WE'D BE HAPPY TO SUPPLY THEM TO YOU, AND
25 THE DEFENDANTS CAN PULL THEM OFF OF ECF, AND YOU CAN DOWNLOAD

1 THEM FROM ECF, TOO.

2 AND WHAT DR. TEECE HAS IN THAT CASE IS HE HAS A CORRELATION
3 ANALYSIS WHERE HE'S MASHED TOGETHER -- HE'S CALCULATED THREE
4 CORRELATIONS. HE'S MASHED TOGETHER ALL THE PRODUCTS IN TERMS
5 OF THE ACTION INTO THREE GROUPS AND SHOW THAT THEY CORRELATE.

6 HE'S GOT NO DOCUMENTARY EVIDENCE SHOWING THAT THERE WAS ANY
7 STRUCTURE TO HOW THESE TRANSACTIONS WERE PRICED, NONE AT ALL.

8 THIS IS -- THIS IS A CASE WHERE, IF I WERE GOING TO
9 ANALOGIZE IT TO A PRICE FIXING CASE, WE HAVE THE AGREEMENT AND
10 THEN, ON THE QUESTION OF IMPACT -- I MEAN, THIS -- AND LET ME
11 BACK UP AND SAY THIS ISSUE COMES UP BECAUSE IN THE MODERN
12 CORPORATE WORLD IN THESE PRICE FIXING CASES THERE ARE -- YOU
13 KNOW, INEVITABLY THERE ARE THOUSANDS OF DIFFERENT PRODUCTS THAT
14 ARE INVOLVED BECAUSE THERE ARE HUNDREDS OF DIFFERENT GRADES OF
15 WHATEVER CHEMICAL IT IS, OR THERE MIGHT BE -- I THINK IN THE
16 LCDS CASE, THERE WERE -- AT ANY GIVEN TIME THERE WERE HUNDREDS,
17 IF NOT THOUSANDS, OF DIFFERENT MODELS OF TFTL SCREENS, TFT LCD
18 SCREENS, EACH OF WHICH WAS JUST A LITTLE BIT DIFFERENT IN THE
19 SENSE THAT THE SCREW WAS IN A DIFFERENT PLACE.

20 THE COURT: BUT YOU DON'T HAVE ANY CASE LAW THAT
21 REALLY SAYS THERE'S A SLIDING SCALE OF IMPORTANCE OF
22 STATISTICAL EVIDENCE BASED ON OTHER FORMS OF EVIDENCE, DO YOU?

23 MR. GLACKIN: I'M NOT AWARE OF A CASE THAT PUTS IT
24 EXACTLY THAT WAY.

25 THE COURT: UM-HUM.

1 MR. GLACKIN: BUT I WOULD OFFER THAT IF YOU HAD A
2 PRICE FIXING CASE, LIKE GPUS WHERE ALL YOU HAVE IS THREE
3 CORRELATIONS, YOU'RE LOOKING AT ONE THING.

4 THE COURT: YEAH.

5 MR. GLACKIN: IF YOU HAD A PRICE FIXING CASE WHERE
6 THE DEFENDANTS NOT ONLY DID THE VIOLATION, BUT THEN THEY ALL
7 CAME IN AND ADMITTED THAT THE THOUSANDS OF DIFFERENT PRODUCTS
8 WERE ALL PRICED OFF OF A BELL CURVE, THEN I THINK YOU WOULD BE
9 A LONG WAY TOWARDS PROVING THAT THE UNLAWFUL AGREEMENT THAT
10 AFFECTED THE PRICE OF SOME OF THESE THINGS HAD AN AFFECT ON ALL
11 OF THEM.

12 IT WOULD BE ALMOST AKIN TO SETTING, YOU KNOW, A PRICE
13 FIXING CONSPIRACY WHERE TARGETS WERE SET FOR BENCHMARK PRICES.
14 IF YOU COULD SHOW THEN THAT ALL THE PRICES WERE SET OFF A BELL
15 CURVE BECAUSE THAT'S JUST HOW THE DEFENDANTS DID BUSINESS, I'M
16 NOT ACTUALLY SURE -- I ACTUALLY THINK THAT TO SHOW IMPACT, YOU
17 WOULDN'T NEED TO DO ANYTHING ELSE.

18 YOU MIGHT NEED TO DO SOMETHING ELSE TO PROVE DAMAGES, WHICH
19 IS A WHOLE DIFFERENT ISSUE.

20 BUT TO SHOW IMPACT, IF YOU SHOWED, IN A PRICE FIXING CASE,
21 AN AGREEMENT TO FIX THE TARGET PRICE OF A HIGH VOLUME PRODUCT
22 AND THE DEFENDANTS CAME IN AND ADMITTED THAT THE PRICES OF THE
23 OTHER PRODUCTS WERE SET ON A BELL CURVE OFF THE HIGH VOLUME
24 PRODUCT, IN MY OPINION YOU'VE PROVEN IMPACT RIGHT THEN AND
25 THERE, OR YOU'VE CERTAINLY, IN THE ABSENCE OF ANY CONTRARY

1 EVIDENCE, MET YOUR BURDEN OF PRODUCTION.

2 THE COURT: LET'S GO TO AND START THE QUESTIONS ON --
3 I WAS SAVING THE BEST FOR LAST -- ALL THE STATISTICAL QUESTIONS
4 FOR THE END.

5 LET'S --

6 MR. VAN NEST: CAN I --

7 THE COURT: OH, I'M SORRY. IT'S ACTUALLY 3:30.
8 MAYBE WE SHOULD -- DO YOU WANT TO JUST DO A QUICK -- TWO
9 MINUTES, PLEASE.

10 MR. VAN NEST: I'LL DO WHATEVER YOU WANT, YOUR
11 HONOR --

12 THE COURT: IN A MINUTE --

13 MR. VAN NEST: -- FOR LEE-ANNE.

14 THE COURT: -- LET'S TAKE A BREAK. WELL, MAYBE WE
15 SHOULD TAKE A BREAK.

16 MR. VAN NEST: I CAN'T DO MUCH IN A MINUTE.

17 MR. GLACKIN: OH, YES, YOU CAN.

18 THE COURT: LET'S GO AHEAD -- I'LL GIVE YOU HALF A
19 MINUTE. GO FOR IT.

20 (LAUGHTER.)

21 MR. VAN NEST: I CAN DO EVEN MORE IN HALF A MINUTE.

22 THE COURT: I'M FEELING GENEROUS.

23 (LAUGHTER.)

24 MR. GLACKIN: NO IMPACT.

25 THE COURT: GO AHEAD.

1 MR. VAN NEST: THE BIG PICTURE, YOUR HONOR, IS THAT
2 IF YOU LOOK AT ALL OF THE STATISTICS, WHAT YOU SEE IS THE
3 OPPOSITE OF A RIGID WAGE STRUCTURE. YOU SEE A STRUCTURE WHICH
4 IS BASED ON PAYING INDIVIDUAL PEOPLE ON A LOT OF DIFFERENT
5 FACTORS BASED ON THEIR PERFORMANCE WHERE THERE IS ENORMOUS
6 VARIABILITY, YEAR TO YEAR, WITHIN THE SAME JOB TITLES
7 EMPLOYEE-TO-EMPLOYEE. THERE IS NO PATTERN. IT IS -- IT IS
8 VERY DISCRETIONARY.

9 THAT IS THE OPPOSITE OF WHAT WOULD BE REQUIRED BASED ON
10 THEIR THEORY, THAT CALLS NOT MADE WOULD HAVE RESONATED THROUGH
11 THE WHOLE CLASS.

12 AND SO WHEN WE GET TO TALKING IN DETAIL -- AND I'VE ONLY
13 GOT A FEW PAGES OF THEM TO SHOW YOUR HONOR, JUST THE
14 HIGHLIGHTS -- YOU WILL SEE THAT WHETHER YOU LOOK AT IT WITHIN A
15 CLASS -- EXCUSE ME -- WITHIN A TITLE OR ACROSS TITLES OR ACROSS
16 COMPANIES, THERE IS NO RIGID STRUCTURE THAT COULD SUPPORT THE
17 THEORY THAT THEY ARE ADVANCING.

18 AND I WOULD SAY WITH RESPECT TO YOUR HONOR'S QUESTION ON
19 DOCUMENTARY EVIDENCE, THERE ISN'T ANY DOCUMENTARY EVIDENCE OF
20 IMPACT. THAT'S THE IMPORTANT THING.

21 IN A LOT OF THESE CASES THERE ARE -- THERE'S ACTUAL
22 AGREEMENT BY THE DEFENDANTS THAT THERE WAS A DO NOT HIRE
23 AGREEMENT IN PLACE, OR SOME SUCH THING. THAT WAS THE WEISFELDT
24 CASE WHERE THERE THE COURT FAILED TO CERTIFY A MUCH SMALLER
25 CLASS, EVEN THOUGH LIABILITY WAS VIRTUALLY ADMITTED, BECAUSE

1 THE COURT SAID "YOU HAVEN'T PROVEN THAT THERE WAS IMPACT TO THE
2 CLASS ON A CLASS-WIDE BASIS."

3 AND THE SAME IS TRUE HERE. ALL THE EVIDENCE YOUR HONOR IS
4 CITING, AND WE DON'T NEED TO DEBATE IT TODAY, ALL THAT GOES TO
5 WHETHER OR NOT THERE WERE AGREEMENTS, WHAT THE INTENT OF THEM
6 WAS, HOW WIDESPREAD THEY WERE, AND SO ON.

7 NONE OF IT GOES TO IMPACT. THERE AREN'T DOCUMENTS THAT
8 SHOW OR ANY DISCUSSION THAT SHOWS ANYBODY WAS IMPACTED. THAT'S
9 WHAT'S LACKING.

10 THAT'S WHY THIS CASE IS GOING TO TURN ON STATISTICS AND
11 STATISTICAL PROOF, AND THAT'S WHY --

12 THE COURT: BUT YOU'RE ASKING THEM TO PROVE A
13 NEGATIVE.

14 MR. GLACKIN: THIS IS THE PROBLEM --

15 MR. VAN NEST: NO.

16 THE COURT: BECAUSE THEY HAD THE AGREEMENT, BECAUSE
17 THERE WAS NO COLD CALLING, BECAUSE PEOPLE COULD NOT SOLICIT
18 EACH OTHER'S EMPLOYEES.

19 MR. VAN NEST: I'M NOT, YOUR HONOR.

20 THE COURT: WHAT'S THE --

21 MR. VAN NEST: THEY SAID THEY COULD PROVE IT BECAUSE
22 THEIR WHOLE CASE THEORY WAS "WE'RE GOING TO SHOW THAT THERE'S A
23 RIGID JOB PAY STRUCTURE AT ALL OF THE DEFENDANTS, SO THAT IF WE
24 CAN SHOW THAT COLD CALLS WEREN'T MADE AND PEOPLE DIDN'T GET
25 INFORMATION, THAT THAT IMPACT ON THAT EMPLOYEE, OR THAT GROUP

1 OF EMPLOYEES, WOULD RESONATE THROUGH THE WHOLE FIRM."

2 THAT WAS THE PROMISE THEY MADE. THAT WAS THE THEORY THEY
3 ARGUED ON THE MOTION TO DISMISS. THAT WAS THE THEORY THEY
4 ARGUED LAST TIME.

5 AND YOU SAID, "FINE. IF THAT'S YOUR THEORY OF COMMON
6 IMPACT, PROVE IT. LET'S SEE WHAT THE NUMBERS SHOW."

7 THEY'VE COME BACK AND THEY'VE FAILED TO PROVE IT, AND
8 DR. LEAMER ADMITS THAT HE CAN'T SHOW IT.

9 THE COURT: LET'S SAVE THAT FOR AFTER THE BREAK. WE
10 ARE GOING TO GET INTO THE WEEDS ON THE STATS.

11 MR. VAN NEST: VERY GOOD.

12 THE COURT: OKAY? ALL RIGHT. LET'S TAKE A BREAK
13 UNTIL 3:45. OKAY? THANK YOU.

14 MR. VAN NEST: THANK YOU, YOUR HONOR.

15 THE COURT: THANK YOU ALL VERY MUCH.

16 (RECESS FROM 3:34 P.M. UNTIL 3:58 P.M.)

17 THE COURT: OKAY. LET'S GO TO DR. LEAMER'S OPENING
18 EXPERT REPORT.

19 MR. GLACKIN: YOU MEAN THE ONE DATED MAY 10TH, OF
20 COURSE?

21 THE COURT: YES, THE ONE DATED IN MAY.

22 WHY DON'T YOU EXPLAIN -- LET'S START WITH EXHIBIT 2. WHY
23 DON'T YOU JUST EXPLAIN WHAT HIS CORRELATION ANALYSIS THEORY IS.
24 WHAT DO THESE DIFFERENT THINGS REPRESENT?

25 MR. GLACKIN: SURE.

1 THE COURT: START WITH EXHIBIT 2, APPLE.

2 MR. GLACKIN: EXHIBIT 2, APPLE. IS THERE A REASON
3 YOU DON'T WANT TO START WITH EXHIBIT 1, ADOBE? BECAUSE THEY'RE
4 EXACTLY THE SAME IN TERMS OF WHAT'S THERE AND THE ADOBE ONE HAS
5 SOME HIGHLIGHTING ON IT THAT MIGHT BE HELPFUL.

6 THE COURT: THAT'S FINE.

7 MR. GLACKIN: WE CAN START WITH APPLE. IT'S THE SAME
8 CHARTS EITHER WAY.

9 EXHIBIT 1 IS THE OUTPUT OF THE REGRESSION ANALYSIS FOR
10 ADOBE; AND THEN EXHIBIT 2 IS THE OUTPUT OF THE REGRESSION
11 ANALYSIS FOR EVERY OTHER COMPANY. SO WE CAN START --

12 THE COURT: WHY DOES IT LOOK DIFFERENT THAN THE APPLE
13 ONE?

14 MR. GLACKIN: YOU MEAN WHY IS THERE HIGHLIGHTING?

15 THE COURT: NO. IF YOU LOOK UNDER SECTION 1, THE
16 CATEGORIES ARE DIFFERENT.

17 MR. GLACKIN: I THINK -- SO PROBABLY -- WHAT'S
18 DIFFERENT IS THE -- SECTION 1 IS ALL JUST A REPORT OF THE
19 CHARACTERISTICS OF THE TITLE IN TERMS OF HOW MANY EMPLOYEES ARE
20 THERE AND WHAT THE HIRING RATE IS FOR EMPLOYEES IN THAT TITLE.

21 I THINK THAT SOME OF THAT INFORMATION WAS OMITTED FROM
22 EXHIBIT 2 BECAUSE IT'S NOT THAT IMPORTANT AND IT ALLOWED THERE
23 TO BE MORE SPACE BETWEEN THE COEFFICIENTS ON THE REGRESSION
24 OUTPUTS, WHICH ARE ALL THE SAME -- I MEAN, ALL THE SAME
25 COLUMNS. I THINK THAT WAS THE ONLY REASON THAT WAS OMITTED.

1 BUT I COULD WALK THROUGH EITHER ONE AND EXPLAIN WHAT THEY
2 MEAN.

3 SO IN OTHER WORDS, THE ONLY -- THE DIFFERENT -- THE
4 REASON -- IF YOU LOOK AT SECTION 1 OF ADOBE AND COMPARE IT TO
5 SECTION 1 OF APPLE, THEY BOTH SHOW THE YEARS OF DATA FOR THE
6 TITLE, AND WHAT THAT MEANS IS -- THAT'S THE NUMBER OF YEARS FOR
7 WHICH WE HAVE DATA FOR THAT JOB TITLE BECAUSE THAT'S A RELEVANT
8 THING TO KNOW.

9 AND THEN THE NEXT COLUMN IS TOTAL EMPLOYEE YEARS, WHICH
10 TELLS YOU THE NEXT THING YOU NEED TO KNOW, WHICH IS HOW MANY --
11 WHAT'S THE WEIGHT OF THAT JOB TITLE WITHIN THE DATA? SO YOU
12 HAVE THE NUMBER OF YEARS.

13 AND THEN YOU HAVE THE NUMBER OF YEARS WORKED BY EMPLOYEES
14 IN THAT JOB TITLE, WHICH IS A RELEVANT THING TO KNOW.

15 THEN THE OTHER COLUMNS IN THE ADOBE CHART ARE ABOUT THE --
16 THEY'RE SORT OF OTHER WAYS OF -- OTHER DESCRIPTIONS OF THE
17 CHARACTERISTICS OF THE NUMBER OF EMPLOYEES IN THAT TITLE.

18 SO AV EMP IS THE AVERAGE NUMBER OF EMPLOYEES IN THAT TITLE
19 AT ANY GIVEN TIME.

20 D-LOG AVERAGE IS THE RATE OF CHANGE OF THE NUMBER OF
21 EMPLOYEES IN THE TITLE.

22 SO, FOR EXAMPLE, IF YOU -- LOOKING AT THE VERY TOP ONE
23 WHERE IT SAYS D-LOG AVERAGE IS .27, THAT MEANS THAT ON AVERAGE,
24 THAT TITLE WAS INCREASING BY 27 PERCENT PER YEAR.

25 AND THEN D-LOG STANDARD DEVIATION IS THE STANDARD DEVIATION

1 OF THE RATE OF CHANGE, AND THE BIGGER THAT NUMBER IS, THE MORE
2 FLUCTUATION THERE WAS AROUND THE CHANGE OF HEAD COUNT IN ANY
3 GIVEN YEAR.

4 SO IN OTHER WORDS, IF THE STANDARD DEVIATION WAS 0, THAT
5 WOULD, I THINK, IMPLY THAT THERE WAS A STATIC 27 PERCENT
6 INCREASE IN HEAD COUNT EVERY YEAR.

7 WITH A STANDARD DEVIATION --

8 THE COURT: AND WHERE DO YOU GET THAT 27 PERCENT?

9 MR. GLACKIN: THAT'S D-LOG AVERAGE .27 ON THE
10 ADOBE EXHIBIT 1.

11 THE COURT: IT'S .018 AND THEN IT'S MINUS .027.

12 MR. GLACKIN: WHAT I'M LOOKING AT IS EXHIBIT 1, WHICH
13 IS ADOBE.

14 THE COURT: OH, YOU'RE LOOKING AT THE FIRST PAGE OF
15 IT.

16 MR. GLACKIN: YEAH.

17 THE COURT: OKAY. I SEE.

18 MR. GLACKIN: YOU SEE THE .27, THE VERY TOP ENTRY.
19 SO THE .34 TELLS YOU THAT IT WASN'T .27 EVERY YEAR.

20 THE HEAD COUNT -- HOW THE HEAD COUNT MOVED IS NOT SUPER
21 IMPORTANT TO THE ANALYSIS AND THAT'S WHY IT WAS OMITTED FROM
22 THE LARGER REPORT OF REGRESSION RESULTS IN EXHIBIT 2.

23 WHAT YOU REALLY NEED TO KNOW TO UNDERSTAND -- TO INTERPRET
24 THOSE RESULTS, I THINK, IS THE NUMBER OF EMPLOYEE YEARS AND THE
25 NUMBER OF YEARS OF DATA WE HAVE. THOSE ARE THE MOST IMPORTANT

1 THINGS TO KNOW.

2 THE COURT: OKAY. WHAT DOES THE T-STAT SHOW?

3 MR. GLACKIN: SO A T-STAT IS A MEASURE OF STATISTICAL
4 SIGNIFICANCE, AND A -- THE BEST WAY TO INTERPRET THEM IS THAT A
5 T-STAT OF 2.0 OR GREATER MEANS THAT THE COEFFICIENT IS
6 STATISTICALLY SIGNIFICANT TO CONVENTIONAL CONFIDENCE LEVELS,
7 WHICH I THINK IN THIS CASE WOULD BE 95 PERCENT LEVELS, OR 5
8 PERCENT LEVELS.

9 THE COURT: SO WHAT IS HIS THEORY? HIS THEORY IS
10 THAT IF HE CAN SHOW THAT THE AVERAGE COMPENSATION FOR A SINGLE
11 JOB TITLE, THAT THE CHANGES IN THAT COMPENSATION ARE CORRELATED
12 TO CHANGES IN THE AVERAGE COMPENSATION FOR THE ENTIRE TECHNICAL
13 CLASS, THAT THAT MEANS THEY'RE RISING AND FALLING TOGETHER? IS
14 THAT THE THEORY? OR WHAT IS IT?

15 MR. GLACKIN: SO IF YOU'LL INDULGE ME, IT MIGHT HELP
16 TO GO BACK TO THE BEGINNING A LITTLE BIT, WHICH IS TO GO BACK
17 TO THE COMMON FACTORS ANALYSIS FROM THE VERY FIRST REPORT.

18 AND THE REASON IT'S IMPORTANT TO GO BACK THERE IS THAT THE
19 DEFENDANTS' MAIN ATTACK ON THIS ANALYSIS HAS BEEN TO SAY THAT
20 DR. LEAMER IGNORED INDIVIDUAL LEVEL DATA AND DIDN'T TAKE INTO
21 ACCOUNT INDIVIDUAL VARIATION WITHIN JOB TITLE AND HOW IMPORTANT
22 THAT IS.

23 AND IT'S ABSOLUTELY NOT TRUE. THE VERY FIRST THING THAT
24 DR. LEAMER DID WAS TO ESTABLISH WHAT -- TO WHAT EXTENT COMMON
25 FACTORS LIKE JOB TITLE, AGE, AND COMPANY EXPLAIN THE

1 COMPENSATION OF INDIVIDUAL EMPLOYEES.

2 AND THIS IS AT THE AREA OF, LIKE, PARAGRAPH 129 IN HIS VERY
3 FIRST REPORT OF OCTOBER 1ST OF 2012.

4 THE COURT: BUT THAT DOESN'T EXPLAIN WHY HE DIDN'T
5 TAKE INDIVIDUAL COMPENSATION HERE, WHY HE AVERAGED IT BY JOB
6 TITLE.

7 MR. GLACKIN: WELL, IT DOES ACTUALLY, BECAUSE WHAT
8 THE -- WHAT THE COMMON FACTORS ANALYSIS SHOWED IS THAT -- AND
9 EVERYBODY AGREES ABOUT THIS AT THIS POINT -- IS THAT THESE
10 COMMON FACTORS EXPLAIN 90-PLUS PERCENT OF AN EMPLOYEE'S
11 COMPENSATION, WHICH IS -- WHICH MEANS THAT IF YOU KNOW THE
12 COMPANY, JOB TITLE, AGE, AND GENDER, I THINK, ARE THE FACTORS
13 OF ANY MEMBER OF THE CLASS, YOU CAN CALCULATE, ON AVERAGE,
14 THEIR COMPENSATION, 94 PERCENT OF THEIR COMPENSATION, OR YOU
15 CAN EXPLAIN 90-PLUS PERCENT OF THEIR COMPENSATION. EXCUSE ME.

16 AND EVERYONE AGREES THAT THAT RESULT IS MAINLY DRIVEN BY
17 TITLE, THAT IT'S ACTUALLY THE TITLE THAT DRIVES 90 PERCENT OF
18 THAT RESULT, EVEN ACCORDING TO DR. MURPHY.

19 SO -- AND OF COURSE WE EXPECT THAT, RIGHT? IF WE HAD A
20 CASE WHERE MOST OF THE EMPLOYEES' COMPENSATION WAS EXPLAINED BY
21 THEIR GENDER, THIS WOULD BE A TITLE 7 LAWSUIT, RIGHT? THAT'S
22 NOT HOW COMPANIES PAY PEOPLE. THEY DON'T PAY THEM ACCORDING TO
23 THEIR GENDER, OR THEY TRY NOT TO. AND THEY DO PAY ACCORDING TO
24 THEIR AGE TO THE EXTENT IT'S A PROXY FOR TENURE.

25 BUT JOB TITLE, EVERYONE AGREES, DRIVES 90 PERCENT PLUS OF

1 THE COMPENSATION OF EVERY MEMBER OF THE CLASS, AND DR. MURPHY
2 AGREED WITH THIS. HE AGREED TO IT UNDER OATH AT HIS
3 DEPOSITION.

4 SO THE VERY FIRST THING DR. LEAMER DID IS ESTABLISH THAT
5 THESE EMPLOYEES ARE EMBEDDED IN A SYSTEM THAT PAYS THEM BASED
6 ON THEIR JOB TITLE.

7 AND ALL OF THE VARIATION THE DEFENDANTS ARE TALKING ABOUT
8 IN TOTAL COMPENSATION -- BY THE WAY, THAT COMMON FACTORS
9 ANALYSIS IS A TOTAL COMP ANALYSIS. IT'S NOT AN ANALYSIS ONLY
10 OF BASE SALARY.

11 ALL THE VARIATION THAT THE DEFENDANTS ARE SAYING IS SO
12 IMPORTANT IS IN THAT TOP AREA. IT'S IN THAT 90 TO 100 PERCENT
13 AREA. THAT'S WHERE ALL THE VARIATION IS HAPPENING. 90 AND
14 BELOW IS DETERMINED BY COMPANY, TENURE, GENDER, AND JOB TITLE,
15 AND 90 PERCENT OF THAT IS DETERMINED BY JOB TITLE.

16 NOW, THAT DOESN'T EVEN MEAN, BY THE WAY, THAT THE VARIATION
17 PART IS ALL DISCRETIONARY BECAUSE THERE'S OTHER FACTORS WE
18 DON'T KNOW, LIKE PEOPLE'S EDUCATION, WHICH IS NOT IN THE DATA
19 SET, THAT PROBABLY WOULD EXPLAIN EVEN MORE APPROACHING UP TO
20 THAT 100 PERCENT LEVEL.

21 SO THE BOTTOM LINE IS, AND THE REASON I'M --

22 THE COURT: SO FROM WHAT I HEAR, WHAT YOU'RE SAYING
23 IS BECAUSE HE FELT THAT THE INDIVIDUAL VARIATIONS WOULD BE
24 MINOR AND WOULD BE EXPLAINABLE BY GENDER, JOB TITLE, AND
25 WHATEVER, HE DIDN'T FEEL LIKE HE NEEDED TO INCORPORATE

1 INDIVIDUAL AVERAGES IN THIS CORRELATION ANALYSIS, THAT HE
2 THOUGHT HE COULD JUST AVERAGE IT ACROSS THE WHOLE JOB TITLE?
3 IS THAT WHAT YOU'RE -- LIKE WHAT IS THE BOTTOM LINE OF WHAT
4 YOU'RE SAYING?

5 MR. GLACKIN: THAT IS ALMOST RIGHT, EXCEPT I'D SAY
6 IT'S EVEN A LITTLE STRONGER.

7 THE COURT: UM-HUM.

8 MR. GLACKIN: ONCE YOU KNOW THAT 90 PERCENT OF HOW
9 THE EMPLOYEES ARE PAID IS BASICALLY BASED ON THEIR JOB TITLE,
10 THEN THE QUESTION IS, IS THERE -- AND THIS IS THE QUESTION THAT
11 WE UNDERSTOOD, THE LINK THAT WE UNDERSTOOD THE COURT TO HAVE
12 FOUND MISSING, WHAT IS IT THAT -- IS THERE SOMETHING HOLDING
13 THOSE JOB TITLES TOGETHER? RIGHT? IS THE TRUTH THAT IN THE
14 REAL WORLD THE JOB TITLES GO LIKE THIS (INDICATING), AND I AM
15 MOVING MY ARMS UP AND DOWN, OR IS THE TRUTH THAT IN THE REAL
16 WORLD THE JOB TITLES MOVE TOGETHER AND ARE CORRELATED?

17 BECAUSE IF YOU SHOW THAT 90 PERCENT OF THE EMPLOYEE TOTAL
18 COMPENSATION IS DRIVEN BY THEIR JOB TITLE AND YOU SHOW THAT THE
19 JOB TITLES ARE CORRELATED, THEN YOU HAVE SHOWN THAT THERE IS A
20 PAY STRUCTURE IN PLACE THAT WILL TEND TO HAVE -- THAT WILL TEND
21 TO SPREAD THE EFFECTS OF THESE AGREEMENTS EXACTLY THE WAY THAT
22 DR. LEAMER POSITED THEY WOULD AS A MATTER OF ECONOMIC THEORY.

23 AND THAT IS EXACTLY WHAT WE HAVE SHOWN.

24 THE COURT: WHAT -- YOU KNOW, IN TAB 3 OF WHAT
25 MR. VAN NEST GAVE ME, I GUESS THAT'S PROBABLY FROM THE

1 SUPPLEMENTAL REPORT, HE SAYS HE'S WORKING WITH TITLE AVERAGES
2 BECAUSE INDIVIDUAL DATA IS LIKELY TO BE DOMINATED BY FORCES
3 THAT OPERATE AT THE INDIVIDUAL LEVEL.

4 WHAT IS THAT? SO THOSE ARE THE FACTORS THAT YOU'RE TALKING
5 ABOUT RIGHT NOW?

6 MR. GLACKIN: WELL, THE --

7 THE COURT: OR WHAT? WHAT'S BEING REFERRED TO HERE?
8 SIMILARLY WHEN HE SAYS IN HIS REPLY REPORT THAT AVERAGING
9 ACROSS THE INDIVIDUALS AND ANY TITLE CAN REDUCE THE INDIVIDUAL
10 IDIOSYNCRATIC EFFECTS, WHAT'S HE REFERRING TO?

11 MR. GLACKIN: WELL, WHAT HE'S REFERRING TO IS THAT IF
12 YOU -- AND THIS IS THE SAME THING THAT DR. MURPHY, THE SAME
13 EXPLANATION DR. MURPHY GAVE FOR USING THE ACS DATA SET --
14 EXCUSE ME -- AVERAGING, AGGREGATING AND AVERAGING THE DATA IN
15 THE ACS DATA SET, WHICH IS IF YOU WANT TO DETECT WHETHER OR NOT
16 THERE IS A STRUCTURE IN WHICH THESE JOB TITLES ARE EMBEDDED,
17 YOU HAVE TO LOOK AT THE AVERAGES, THE AVERAGE COMPENSATION
18 WITHIN THE JOB TITLE.

19 AND WE'VE ESTABLISHED THAT THAT'S THE APPROPRIATE LEVEL OF
20 AGGREGATION IN A NUMBER OF WAYS.

21 FIRST OF ALL, WE'VE SHOWN THAT 90 PERCENT OF THE EMPLOYEES'
22 COMPENSATION IS DRIVEN BY JOB TITLE.

23 SECOND OF ALL --

24 THE COURT: DO YOU AGREE WITH THAT?

25 MR. VAN NEST: I THINK -- I DON'T KNOW IF IT'S 90

1 PERCENT, YOUR HONOR. I DISAGREE WITH THE SIGNIFICANCE OF IT,
2 BUT I THINK THAT JOB TITLE DOES EXPLAIN A LOT OF COMPENSATION.

3 BUT THE JOB TITLE RANGES ARE HUGE AND THEY INCLUDE SALARY,
4 BONUS, AND EQUITY, WHICH IS WHY DR. LEAMER HAD TO AVERAGE TO
5 GET EVEN THE RESULTS HE DID.

6 THE INDIVIDUAL FORCES HE'S TALKING ABOUT THAT DOMINATE ARE
7 THINGS LIKE HOW WELL DID THE INDIVIDUAL PERFORM? WAS HE IN A
8 REALLY IMPORTANT UNIT? HOW -- YOU KNOW, HOW WELL IS THE
9 COMPANY DOING THAT YEAR? FOUR FACTORS THAT APPLY TO THE
10 INDIVIDUAL.

11 AND THOSE DOMINATE, AND THEY DOMINATE BECAUSE IN
12 SILICON VALLEY, PEOPLE ARE PAID BASED ON PERFORMANCE AND THERE
13 IS NO WRITTEN -- YOU KNOW, THERE'S NO RIGID STRUCTURE. SOME OF
14 THE BANDS ARE --

15 THE COURT: BUT CAN YOU CONTROL FOR PERFORMANCE AND
16 STILL HAVE THE COMPENSATION MOVING TOGETHER?

17 MR. VAN NEST: COULD YOU?

18 THE COURT: YEAH.

19 MR. VAN NEST: I'M NOT SURE, BECAUSE CERTAINLY THE
20 RAW DATA HERE SHOWS THAT THE COMPENSATION NEVER MOVES TOGETHER
21 FOR ANY TITLE FOR ANY OF THESE COMPANIES. THAT'S WHAT WE'LL
22 GET TO IN MY DATA, YOU KNOW, THE RAW DATA IN A MINUTE.

23 AND WHAT HE'S SAYING HERE, DR. LEAMER, IS "IF I HAD TO LOOK
24 AT INDIVIDUAL DATA, IT WOULD BE DOMINATED BY INDIVIDUAL
25 FACTORS."

1 AND THIS IS WHAT GRADY AND ALSUP BOTH SAID, TOO, IS THAT --

2 THE COURT: BUT WHAT DID HE DEFINE AS THE INDIVIDUAL
3 FACTORS, THE IDIOSYNCRATIC EFFECTS? WHAT WAS HE REFERRING TO?

4 MR. VAN NEST: THINGS THAT OPERATE ON THE INDIVIDUAL
5 LEVEL, LIKE PERFORMANCE OF THE INDIVIDUAL.

6 THE COURT: DO YOU AGREE WITH THAT, MR. GLACKIN?

7 MR. GLACKIN: NO, I DON'T AGREE THAT THAT'S THE ONLY
8 FACTOR.

9 THE COURT: BUT YOU AGREE THAT IT IS, THE PAID FOR
10 PERFORMANCE?

11 MR. GLACKIN: YES. I AGREE --

12 THE COURT: OKAY. WHAT ELSE? WHAT ELSE?

13 MR. GLACKIN: ANOTHER FACTOR WOULD BE EDUCATION,
14 WHICH WE DON'T HAVE -- WHICH WE CAN'T USE AS A VARIABLE BECAUSE
15 IT WASN'T CONSISTENTLY RECORDED IN THE DATA, AND WE WOULD HAVE
16 LOVED TO DO THAT BECAUSE I THINK THEN WE WOULD BE ABLE TO
17 EXPLAIN EVEN MORE. BUT THAT'S ONE.

18 AND THEN ANOTHER IMPORTANT ONE IS TENURE, OR WE'VE INCLUDED
19 THE VARIABLE OF AGE, BUT THE FACTOR IS TENURE. PEOPLE WHO ARE
20 LONGER IN THE COMPANY ARE GOING TO -- AND MORE EXPERIENCED ARE
21 GOING TO GET PAID MORE THAN PEOPLE WHO ARE NEW, AND THAT'S JUST
22 A FACT OF LIFE.

23 AND SO IF YOU'RE TRYING TO ESTABLISH, OR DETERMINE I SHOULD
24 SAY, WHETHER OR NOT THERE'S A STRUCTURE HOLDING TOGETHER THESE
25 JOB TITLES, IT'S APPROPRIATE TO AVERAGE THE INDIVIDUAL DATA TO

1 REDUCE THE EFFECT OF THOSE FACTORS.

2 AND THIS IS EXACTLY THE SAME APPROACH THAT DR. MURPHY TOOK
3 WITH RESPECT TO THE ACS DATA SET, AND HE EXPLAINED IT IN
4 EXACTLY THE SAME WORDS ACTUALLY.

5 MR. VAN NEST: SO --

6 THE COURT: WELL, DOES -- WOULD DR. LEAMER AGREE THAT
7 THERE ARE SUBSTANTIAL VARIATIONS IN COMPENSATION WITHIN A JOB
8 TITLE?

9 MR. GLACKIN: I THINK HE'D CERTAINLY AGREE THAT
10 SOMETIMES THERE ARE, THAT THERE COULD BE. I MEAN, I DON'T
11 THINK WE'RE RULING THAT OUT AS A POSSIBILITY. I MEAN, I THINK
12 IT DEPENDS WHAT YOU MEAN BY "SUBSTANTIAL."

13 BUT THE -- YOU KNOW, LOOK, THE DIFFERENCES IN PAY LEVEL, I
14 MEAN, THEY ARE WHAT THEY ARE.

15 AND, YOU KNOW, THE DEFENDANTS HAVE NOT DONE AN
16 EMPLOYEE-BY-EMPLOYEE CORRELATION ANALYSIS TO SHOW THAT THE PAY
17 OF THE EMPLOYEES IS NOT CORRELATED TOGETHER.

18 TO DO THAT, YOU WOULD HAVE TO CREATE A MATRIX THAT WAS
19 60,000 -- OR FOR THE BIGGEST EMPLOYER, INTEL, YOU'D HAVE TO
20 CREATE A MATRIX THAT WAS 36,000 BY 36,000 ACROSS.

21 BUT IF YOU DID THAT, THE COMMON FACTORS ANALYSIS TELLS YOU
22 WHAT YOU WOULD SEE, WHICH IS THAT EMPLOYEES IN THE SAME JOB
23 TITLE, YOU KNOW, DO TEND TO HANG TOGETHER BECAUSE THEIR
24 COMPENSATION IS PRINCIPALLY DRIVEN BY JOB TITLE. IT'S JUST AN
25 UNDISPUTED FACT AT THIS POINT, AS I UNDERSTAND IT, THAT JOB

1 TITLE IS THE MAJOR DETERMINING FACTOR IN COMPENSATION. AND SO
2 HENCE THE INQUIRY THAT WE TURNED TO, WHICH IS, DOES THIS
3 STRUCTURE EXIST?

4 AND WE UNDERSTOOD THE CRITICISMS OF THE DEFENDANTS LAST
5 TIME TO BE THAT WE HAD NOT SHOWN THAT THIS CORRELATION HELD
6 OVER TIME, AND WE HAD NOT SHOWN THAT THE -- WE HAD NOT SHOWN
7 COMPREHENSIVELY THE CORRELATION OF THE JOB TITLES BECAUSE THE
8 CO-MOVEMENT CHARTS WERE SELECTIVE.

9 SO WE SET ABOUT TO ANSWER THOSE CRITICISMS, IN ADDITIONAL
10 TO THE OVERTREADTH CONCERN I WOULD SAY.

11 MR. VAN NEST: SO, YOUR HONOR, IT IS -- IT IS
12 DEFINITELY AGREED BY EVERYONE THAT PERFORMANCE IS A HUGE
13 FACTOR; AND IT IS NOT AGREED, CERTAINLY NOT BY US, AND I DON'T
14 THINK DR. LEAMER DISPUTES THIS, THAT THERE IS ENORMOUS
15 VARIATION IN PAY WITHIN EACH JOB TITLE.

16 THAT'S WHAT WE'RE SHOWING IN TABS 4 AND 5. IT'S NOT THAT
17 COMPLICATED, EITHER. WHAT WE SHOW HERE IN TAB 4 IS -- AND THIS
18 IS IN DR. MURPHY, EXHIBIT 1 -- THAT IF YOU PICK A TITLE, LIKE
19 ARCHITECT AT INTUIT, AND YOU PLOT THE PEOPLE IN THAT CATEGORY,
20 RIGHT THERE ON TAB 4 --

21 THE COURT: WELL, LET ME ASK YOU A QUESTION.

22 MR. VAN NEST: -- YOU SEE HUGE VARIATION UP AND DOWN.

23 THE COURT: I HEAR THAT.

24 BUT YOU ALSO SEE THAT WITH GOOGLE AFTER THE BIG BANG WHERE
25 THEY GAVE ACROSS THE BOARD 10 PERCENT INCREASE TO ALL EMPLOYEES

1 AND YOU STILL SEE THAT LEVEL OF VARIATION.

2 MR. VAN NEST: THAT'S RIGHT.

3 THE COURT: SO LET ME ASK --

4 MR. VAN NEST: THERE'S AN EXPLANATION FOR THAT, TOO.

5 THE COURT: -- WHY IS THAT? WHY ARE SOME PEOPLE'S
6 SALARIES GOING DOWN WHEN THE ENTIRE WORK FORCE IS GETTING A 10
7 PERCENT SALARY INCREASE?

8 MR. VAN NEST: THEY DIDN'T GET A 10 PERCENT SALARY
9 INCREASE WITH BIG BANG, YOUR HONOR. SO WHAT THEY GOT WAS A
10 CHANGE IN THE FORM OF COMPENSATION. PEOPLE GOT A BUMP IN THEIR
11 BASE PAY, BUT NOT NECESSARILY IN THEIR TOTAL COMP.

12 NOT EVERYBODY GOT AN INCREASE, BY THE WAY, AS DR. LEAMER'S
13 TABLE SHOWS.

14 WHAT HAPPENED WITH BIG BANG, BY THE WAY, IS NOT AN EXAMPLE
15 OF RIPPLE. IT'S NOT AN EXAMPLE OF RIPPLE. RIPPLE IS IF I
16 CHANGE A FEW, THEN EVERYBODY GETS CHANGED BECAUSE THE JOB
17 STRUCTURES ARE RIGID.

18 RIPPLE -- OR EXCUSE ME. BIG BANG WAS A VERY UNIQUE, AS
19 DR. LEAMER PUT IT, SPECIFIC RESPONSE TO ONE SET OF FACTS, WHICH
20 WAS ENORMOUS HIRING BY FACEBOOK OF GOOGLE EMPLOYEES, AND IT IS
21 AN EXTERNAL FACTOR. IT'S A COMPANY-WIDE DECISION TO MOVE
22 EVERYTHING.

23 IT'S NOT AN EXAMPLE OF DR. LEAMER'S THEORY.

24 IN BIG BANG, BY THE WAY, TOTAL COMP DID NOT GO UP ANY MORE
25 THAT YEAR THAN IN ANY OTHER YEAR AT GOOGLE, BECAUSE WHAT THEY

1 DID WAS THEY SAID, "WE'RE GOING TO PAY MORE IN BASE PAY, BUT
2 NOT AS MUCH IN BONUS AND EQUITY."

3 IT WAS A CHANGE IN THE MIX. GOOGLE EMPLOYEES WERE
4 OBJECTING TO A MIX OF PAY IN WHICH EQUITY WAS HEAVILY WEIGHED
5 BECAUSE THEY DIDN'T VALUE EQUITY AS HIGH, AS HIGHLY, AND SO
6 IT -- IT WAS A SHIFT IN THE FORM OF PAYMENT, NOT NECESSARILY
7 THE TOTAL.

8 AND AS YOU LOOK AT CHARTS LIKE THE CHART I'M SHOWING HERE
9 IN TAB 4, YOUR HONOR, THE KEY POINT IS THAT PAY IS MOVING IN
10 EACH YEAR FOR SOME EMPLOYEES WITHIN THE SAME TITLE UP A LITTLE,
11 SOME DOWN A LITTLE, SOME UP A LOT, A FEW DOWN A LOT.

12 AND IF YOU LOOK AT HOW PEOPLE MOVED AGAINST THE AVERAGE, IN
13 MANY OF THESE YEARS, MORE THAN HALF THE PEOPLE IN A GIVEN TITLE
14 MOVE IN A DIFFERENT DIRECTION THAN THE AVERAGE.

15 AND WHAT WE'RE SAYING NOW --

16 THE COURT: OKAY. I'M SORRY. LET ME INTERRUPT YOU.

17 MR. VAN NEST: YES.

18 THE COURT: MY QUESTION WAS HOW TO EXPLAIN THE SALARY
19 FALLS DURING THE BIG BANG YEAR.

20 SO LET ME ASK THAT TO MR. GLACKIN.

21 MR. GLACKIN: SURE. I MEAN, I -- SO THE -- WE'VE
22 NEVER DISPUTED -- WE'VE NEVER SAID THAT THE PLAINTIFF -- THAT
23 THE DEFENDANTS PAY ALL THEIR EMPLOYEES THE SAME OR THAT THEY
24 PAY THEM IN LOCKSTEP. WE NEVER SAID THAT, THAT THERE'S NO
25 VARIATION. THERE IS ABSOLUTELY VARIATION IN HOW THEY PAY THEIR

1 EMPLOYEES.

2 BUT THE POINT I THINK -- I KNOW THE CHART YOU'RE THINKING
3 OF IN DR. LEAMER'S REPLY REPORT. WHAT YOU LEARN FROM THAT --
4 SO YOU WANT -- THE ANSWER TO YOUR QUESTION IS WHY WOULD
5 SOMEBODY'S TOTAL COMP GO DOWN? THE ANSWER MIGHT BE THAT IN
6 2010, THEY WERE -- PERHAPS THEY GOT A HIGHER, A HIGHER AMOUNT
7 OF TOTAL COMP BECAUSE THEY HAD A GOOD YEAR OR THEY GOT A BONUS.
8 I MEAN, THERE CERTAINLY CAN BE VARIABILITY IN PAY, AND SO IT
9 MIGHT BE THAT WHATEVER THEY GOT IN 2010, DESPITE THE BIG BANG,
10 EXCEEDED WHAT THEY GOT IN 2011, BUT THEIR BASE SALARY, FROM
11 WHICH A LOT OF OTHER THINGS FLOW AT THESE COMPANIES, WAS
12 INCREASED BY 10 PERCENT IN 2011.

13 AND THAT'S -- THE POINT OF THAT CHART IS TO ILLUSTRATE WHY
14 IT IS MISLEADING TO LOOK AT THE INDIVIDUAL LEVEL DATA, BECAUSE
15 I COMPLETELY DISAGREE WITH MR. VAN NEST. THIS IS EXACTLY THE
16 KIND OF PREEMPTIVE RESPONSE THAT IT IS OUR POSITION WOULD HAVE
17 OCCURRED HAD THESE AGREEMENTS NOT BEEN ENTERED INTO. IT MIGHT
18 NOT HAVE BEEN 10 PERCENT EVERY YEAR, BUT IT WAS THESE KINDS OF
19 PREEMPTIVE RESPONSES THAT WE SAY WERE PRECLUDED BY THE
20 AGREEMENTS.

21 AND LET ME SAY ONE OTHER THING. I MEAN, WHEN MR. VAN NEST
22 SAYS THAT GOOGLE JUST SORT OF WASHED IT ALL OUT AND DIDN'T GIVE
23 THEIR EMPLOYEES ANY MONEY, GOOGLE TESTIFIED IN THIS CASE, AND I
24 WOULD HAVE TO GET THE CITE OUT OF THE BRIEFS, THAT THE BIG BANG
25 COST THEM \$500 MILLION. SO SOMEHOW NOTWITHSTANDING THAT THEY

1 SMOOTHED EVERYTHING OUT AND IT DIDN'T REALLY HAVE ANY IMPACT,
2 IT COST THEM \$500 MILLION.

3 SO I JUST DON'T AGREE WITH THAT AS A FACTUAL ASSERTION THAT
4 THIS WAS A NON-EVENT FOR THE EMPLOYEES OF GOOGLE.

5 THE COURT: SO LET ME ASK, WHAT IS YOUR BEST EVIDENCE
6 THAT COMPENSATION FOR EMPLOYEES MOVES TOGETHER WITHIN THE SAME
7 JOB TITLE? WHAT'S THE BEST EVIDENCE THAT YOU HAVE ON THAT?

8 MR. GLACKIN: THE BEST -- WITHIN THE JOB TITLE --

9 THE COURT: UM-HUM.

10 MR. GLACKIN: -- THE BEST ANALYSIS WE HAVE IS THE
11 COMMON FACTORS ANALYSIS WHICH SHOWS THAT IT IS THE TITLE ITSELF
12 THAT DETERMINES 90 PERCENT, APPROXIMATELY, OF THE INDIVIDUAL
13 EMPLOYEE'S SALARY.

14 AND I JUST WANT TO STRESS AGAIN, THAT ANALYSIS WAS RUN ON
15 AN EMPLOYEE-BY-EMPLOYEE BASIS. IT WAS NOT AVERAGED. IT WAS --
16 WE ASKED, WHAT PERCENT OF EACH EMPLOYEE'S COMPENSATION CAN YOU
17 EXPLAIN WITH THESE COMMON FACTORS? AND THE ANSWER IS, YOU
18 KNOW, APPROXIMATELY 90 PERCENT IS EXPLAINED BY JOB TITLE.

19 AND THAT IS THE EVIDENCE -- IT IS THAT EVIDENCE, PLUS THE
20 HUGE DOCUMENTARY RECORD, THAT THE DEFENDANTS OPERATE A
21 TITLE-BASED PAY SYSTEM. AGAIN, I CAN'T IMAGINE THAT THERE IS
22 SERIOUS DISPUTE AT THIS POINT THAT THE DEFENDANTS OPERATE A
23 TITLE-BASED -- THAT EACH OF THEM OPERATES A TITLE-BASED
24 COMPENSATION SYSTEM.

25 THE -- IT IS THOSE TWO FACTS THAT TELL US THAT JOB TITLE IS

1 THE RIGHT PLACE TO LOOK FOR THE EXISTENCE OF A STRUCTURE AND
2 THE RIGHT PLACE TO ASK THE QUESTION OF WHETHER OR NOT
3 COMPENSATION IS MOVING TOGETHER.

4 THE COURT: BUT YOU WOULD CONCEDE THAT AVERAGING IT
5 BY TITLE, AS DR. LEAMER DID, DOES MASK SOME OF THE INDIVIDUAL
6 VARIATIONS --

7 MR. GLACKIN: THAT'S THE POINT --

8 THE COURT: -- THAT WOULD HAPPEN WITHIN A TITLE?

9 MR. GLACKIN: I ABSOLUTELY AGREE. I CONCEDE THAT AND
10 I AGREE WITH IT. AND IN FACT, IT IS NECESSARY TO DO IT, AS A
11 MATTER OF GOOD STATISTICS, FOR THE VERY REASONS GIVEN BY
12 DR. MURPHY WHEN HE EXPLAINED DOING THIS WITH RESPECT TO THE ACS
13 DATA.

14 LET ME -- AGAIN, TO TALK ABOUT AVERAGING AND GPUS FOR A
15 MINUTE, GPUS DOES NOT STAND FOR THE PROPOSITION THAT ONE MAY
16 NEVER AVERAGE. YOU HAVE TO AVERAGE TO DO CORRELATION ANALYSIS.
17 AVERAGING IS FUNDAMENTAL TO MOST STATISTICAL INQUIRIES.

18 AND DR. MURPHY TESTIFIED THAT HE AVERAGES DATA ALL THE
19 TIME. HE SAID SOMETIMES HE DOESN'T, SOMETIMES HE DOESN'T USE
20 AGGREGATE OR AVERAGE DATA, BUT A LOT OF TIMES HE DOES. AND HE
21 CONCEDED, AVERAGING IS A BASIC, USEFUL TOOL IN STATISTICS.

22 WHAT HAPPENED IN GPUS, AS I SAID, AND YOU CAN PULL THE
23 REPORTS OFF ECF, DR. TEECE, I THINK, DID THREE CORRELATION
24 ANALYSES. HE ASKED WHETHER YOU COULD CORRELATE ALL THE
25 PURCHASERS OF THE LITTLE -- ALL THE LITTLE GUYS AND ALL THE BIG

1 GUYS AND WHETHER THOSE THINGS MOVED TOGETHER IN TIME, AND HE
2 MASHED TOGETHER ALL THE PRODUCTS, ALL OF THE DISTRIBUTION
3 CHANNELS, ALL OF THE DIFFERENT OEMS INTO BIG BLOCKS.

4 WE HAVE -- YOU CAN SEE HIS REPORT OF THE CORRELATION
5 RESULTS. IT'S A SINGLE TABLE WITH THREE ROWS.

6 WE HAVE DONE -- WE HAVE DONE THE CORRELATION ANALYSIS ON
7 THE 2400 JOB TITLES. WE HAVE -- WHERE POSSIBLE, WHERE WE HAVE
8 ENOUGH DATA. WE HAVEN'T DONE IT FOR ALL 2400, TO BE CLEAR.

9 WE HAVE EXPANDED THIS ANALYSIS TO INCLUDE ALL 2400 TITLES
10 IN AN ATTEMPT --

11 THE COURT: EVERYONE KEEPS SAYING 2400 AND I THOUGHT
12 THE ORIGINAL NUMBER WAS A LITTLE HIGHER THAN THAT. IS THE
13 DIFFERENCE BECAUSE INTUIT, LUCASFILM, AND PIXAR ARE GONE?

14 MR. GLACKIN: NO, I DON'T THINK THAT MAKES ANY
15 DIFFERENCE. AND I THINK -- I WANT TO SAY THE NUMBER IS
16 2350-ish. BUT I DON'T HAVE --

17 THE COURT: I THOUGHT IT WAS 2536 IS WHAT I READ FROM
18 ONE OF THE EARLIER -- IT'S 2400 NOW?

19 MR. GLACKIN: I THINK WE'RE USING THAT NUMBER
20 LOOSELY.

21 THE COURT: OKAY.

22 MR. GLACKIN: I WOULD GO WITH WHAT'S WRITTEN DOWN.

23 THE COURT: OKAY.

24 MR. VAN NEST: 2400 IS, IF NOT THE PRECISE NUMBER,
25 YOUR HONOR, VERY CLOSE.

1 THE COURT: VERY CLOSE.

2 MR. VAN NEST: RIGHT. AND THERE'S NO DISPUTE ABOUT
3 THAT.

4 MR. GLACKIN: YEAH, THERE'S A LOT OF TITLES.

5 THE COURT: OKAY. LET'S GO TO THE MURPHY EXHIBITS 7
6 AND 8.

7 MR. VAN NEST: WHICH ONE, YOUR HONOR?

8 THE COURT: EXHIBITS 7 AND 8. AND THAT'S IN YOUR --

9 MR. VAN NEST: WE HAVE IT BEHIND TAB 6, YOUR HONOR.

10 THE COURT: BEHIND TAB 6.

11 MR. VAN NEST: AND IF YOU'D LIKE ME TO EXPLAIN THAT,
12 I CAN.

13 THE COURT: LET ME ASK, HOW DO THE PLAINTIFFS RESPOND
14 TO THIS?

15 MR. GLACKIN: SURE. SO --

16 THE COURT: DOESN'T THIS UNDERMINE YOUR CORRELATION
17 THEORY?

18 MR. GLACKIN: NOT AT ALL.

19 THE COURT: WHY NOT?

20 MR. GLACKIN: THERE'S TWO REASONS THAT THESE CHARTS
21 ARE MISLEADING.

22 YOU HAVE TO REMEMBER THAT THE THING WE'RE ASKING IS, IS
23 THERE A RELATIONSHIP BETWEEN THE TITLES OVER TIME, OR IS THERE
24 A RELATIONSHIP BETWEEN THE TITLES AND AVERAGE -- TECHNICALLY
25 WHAT WE'VE MEASURED IS A RELATIONSHIP BETWEEN THE TITLES AND

1 ALL THE OTHER TITLES AT THE SAME COMPANY. IS THERE A
2 RELATIONSHIP THERE, A POSITIVE RELATIONSHIP OVER TIME?

3 THE QUESTION ISN'T, DO THEY ALL MOVE TOGETHER AT EXACTLY
4 THE SAME TIME?

5 THE QUESTION IS, IS THAT RELATION POSITIVE OVER TIME?

6 AND SO THAT PROPOSITION THAT THE RELATIONSHIP IS POSITIVE
7 OVER TIME IS COMPLETELY CONSISTENT WITH THERE SOMETIMES BEING
8 VARIATION AND WITH THEM SOMETIMES GOING IN DIFFERENT
9 DIRECTIONS.

10 BUT WHAT IT TELLS YOU IS, AND THIS WAS EXACTLY THE
11 QUESTION THAT WE UNDERSTOOD TO HAVE BEEN POSED, WHAT IT TELLS
12 YOU IS THAT OVER TIME, THE RELATIONSHIP IS POSITIVE AND THAT
13 THEY WILL TEND -- THEY ARE MOVING IN THE SAME DIRECTION
14 TOGETHER.

15 THE REASON THAT -- SO THAT'S WHY IT'S MISLEADING WITH
16 RESPECT TO THE FIRST CHART TO FOCUS ON -- I MEAN, CERTAINLY
17 THERE IS VARIATION. BUT IT'S MISLEADING TO LOOK AT THE FIRST
18 CHART AND SIMPLY SAY, OH, YOU KNOW, THEY DIDN'T ALL MOVE THE
19 SAME WAY AT THE SAME TIME, HENCE, THERE'S NO STRUCTURE, BECAUSE
20 OVER TIME THERE IS A STRUCTURE.

21 WITH RESPECT TO THE SECOND CHART, WHAT'S COMPLETELY
22 MISLEADING ABOUT THAT CHART IS THAT THOSE, THOSE DOTS ARE NOT
23 NECESSARILY THE SAME, IN THE SAME POSITION EVERY YEAR. I MEAN,
24 WHAT YOU'RE SEEING HERE IS -- WHAT THERE ARE -- WHAT THIS IS
25 SHOWING IS THAT IN 2002, ALL OF THE -- FOR EXAMPLE, AT ADOBE

1 THE JOB TOTAL AVERAGE COMPENSATION WENT DOWN AND IT WENT DOWN
2 BY DIFFERENT AMOUNTS FOR DIFFERENT TITLES, AND THEN YOU SEE THE
3 NEXT YEAR IT WENT UP FOR MOST TITLES, AND FOR SOME TITLES IT
4 WENT DOWN.

5 BUT IT DOESN'T -- AND THEN YOU SEE THAT IT'S -- ACTUALLY
6 YOU CAN SEE A PATTERN THERE BEING REPEATED OVER TIME.

7 BUT THE BOTTOM DOT IS NOT ALWAYS THE BOTTOM DOT, RIGHT?

8 SO IT'S TOTALLY FINE. I MEAN, WE AGREE THAT IN ANY GIVEN
9 YEAR, THERE MAY BE A DIVERGENCE. THERE MAY BE VARIABILITY.

10 BUT WHAT THE STATISTICAL ANALYSIS TELLS US IS THAT OVER
11 TIME, THAT VARIABILITY IS TIED TO A POSITIVE STRUCTURE.

12 THE COURT: MR. VAN NEST.

13 MR. VAN NEST: YOUR HONOR, YOU'VE HIT IT RIGHT ON THE
14 HEAD. THIS -- WE WERE TALKING A MINUTE AGO ABOUT VARIATION
15 WITHIN A TITLE, THAT WAS TAB 4 AND 5, AND IT'S CONCEDED NOW
16 THAT THE AVERAGING MASKS THAT.

17 THIS ASKS A DIFFERENT QUESTION. THIS IS BETWEEN TITLES.
18 CAN THEY SHOW THAT THERE'S A RIGID JOB STRUCTURE SO THAT THE
19 TITLES ARE CORRELATED BETWEEN THEMSELVES?

20 THE TOP OF THE PAGE, IN MY TAB, IS WHAT DR. LEAMER SAYS IS
21 HIS BEST CASE. THAT'S HIS BEST CORRELATION. HE'S TAKEN SOME
22 TITLES AT ADOBE, HE'S CHERRY PICKED SIX OF THEM, HE'S SHOWN THE
23 GRAPH AND HE SAYS THIS IS A GREAT CORRELATION BETWEEN TITLES.

24 ALL MURPHY DID WAS, AT THE BOTTOM OF THE PAGE, IS HE
25 EXPANDED THE NUMBER OF TITLES WITHIN EACH COMPANY YOU LOOK AT.

1 HE LOOKED AT THE 50 MOST POPULATED, THE TITLES WITH THE MOST
2 EMPLOYEES, AND HE'S PLOTTING, YEAR TO YEAR, WHETHER THAT TITLE
3 MOVED UP OR MOVED DOWN.

4 AND AS YOUR HONOR CAN SEE, AND THIS HAS BEEN DEMONSTRATED
5 OVER AND OVER AGAIN, THERE'S HUGE VARIATION.

6 EACH COMPANY, YEAR BY YEAR, SOME TITLES MOVE UP A LITTLE,
7 SOME MOVE UP A LOT, SOME MOVE DOWN A LITTLE, SOME MOVE DOWN A
8 LOT.

9 AND IT'S NOT THE SAME TITLES. THERE IS NO FIXED PATTERN
10 OF ANY OF THIS. THERE IS ENORMOUS VARIABILITY.

11 AND WHAT EXHIBIT 7 AND EXHIBIT 8 ARE SHOWING RIGHT ON THE
12 HEAD IS THE SECOND PART OF THE EQUATION. WE'VE SHOWN HUGE
13 VARIATION WITHIN A TITLE. THIS SHOWS HUGE VARIATION ACROSS
14 TITLES BECAUSE IT SHOWS THAT WHEN YOU LOOK AT MORE THAN A FEW
15 AND YOU EXPAND IT TO THE TOP 50 FOR EACH COMPANY, YOU SEE,
16 OBVIOUSLY ON THE PAGE, AN ENORMOUS VARIATION UP AND DOWN OF
17 DIFFERENT TITLES YEAR AFTER YEAR AFTER YEAR, WHICH PROVES OUR
18 POINT THAT THERE ISN'T ANY SORT OF A RIGID JOB STRUCTURE WHERE
19 PEOPLE MOVE -- WHERE EVERYTHING -- WHERE A CHANGE IN SOME WOULD
20 AFFECT IN A CHANGE IN ALL, OR A CHANGE IN SOME WOULD PROPAGATE
21 OUT.

22 AND THINK ABOUT IT LOGICALLY. WHY IN THE WORLD WOULD THE
23 FACT THAT A SOFTWARE ENGINEER HERE IN SILICON VALLEY WHO DIDN'T
24 GET A CALL, WHY WOULD THAT AFFECT A MASK DESIGNER IN
25 NEW MEXICO? WHY WOULD THAT AFFECT A SEMICONDUCTOR

1 MANUFACTURING PERSON IN ARIZONA? WHY WOULD THAT AFFECT A
2 CONSTRUCTION MANAGER, AN ARTIST, A CHEMICAL ENGINEER, AN
3 ELECTRICAL ENGINEER? THAT'S THE POINT OF THIS 2400 TITLE
4 PROBLEM AND 60,000 EMPLOYEES.

5 IT'S UNPRECEDENTED FOR A REASON. NO COURT ANYWHERE HAS
6 EVER FOUND, IN A CASE LIKE THIS, THAT YOU CAN CERTIFY AND
7 EXPECT TO PROVE COMMON IMPACT OVER A GROUP THIS DISPARATE.

8 AND THIS TAB 6, EXHIBIT 7 FROM MURPHY, PROVES THAT THERE
9 IS NO RIGID PAY STRUCTURE, RIGHT? IT IS A STRUCTURE BASED ON
10 PAYING FOR PERFORMANCE WHERE TITLES MOVE IN DIFFERENT
11 DIRECTIONS EACH YEAR AND WHERE INDIVIDUAL EMPLOYEES MOVE IN
12 DIFFERENT DIRECTIONS EACH YEAR.

13 AND THE ONLY WAY LEAMER CAN GET ANYWHERE CLOSE TO WHAT HE
14 GOT IS BY AVERAGING. HE AVERAGED EVERYTHING. HE AVERAGED
15 INDIVIDUAL EMPLOYEE PAY WITHIN A TITLE. HIS REGRESSIONS ARE
16 BASED ON AVERAGES. HIS CORRELATIONS ARE BASED ON AVERAGES.

17 AND WHAT THE CASE LAW SAYS REPEATEDLY IS NOT THAT YOU CAN
18 NEVER AVERAGE. THAT'S NOT WHAT WE'RE SAYING. YOU CAN AVERAGE
19 IN ECONOMIC ANALYSIS.

20 BUT WHEN THE QUESTION IS WHETHER YOU CAN PROVE COMMON
21 IMPACT WHEN WHAT'S INVOLVED ARE LOTS OF INDIVIDUAL PEOPLE AND
22 DECISIONS, AVERAGING THEM TELLS YOU NOTHING BECAUSE THE FACT
23 THAT AN AVERAGE GOES UP OR DOWN DOESN'T TELL YOU WHETHER ALL OR
24 NEARLY ALL PEOPLE WERE AFFECTED.

25 SO OUR POINT WITH TABS 4, 5, 6, AND 7 IS THEY FLUNKED THE

1 BASIC TEST THAT YOU GAVE THEM AND NOW THEY'RE WALKING AWAY FROM
2 IT, AND THEY FLUNKED IT SO BAD THAT DR. LEAMER HAS TO ADMIT,
3 WHICH IS IN TAB 1 -- WE ASKED HIM POINT BLANK, "DO YOUR
4 RESULTS, YOUR CORRELATION, YOUR REGRESSION, EVERYTHING YOU DID,
5 DO THEY ENABLE YOU TO CONCLUDE THAT ADOBE'S COMP STRUCTURE WAS
6 SO RIGID THAT RAISES FOR ONE OR A FEW WOULD HAVE NECESSARILY
7 PROPAGATED INTO RAISES FOR ALL?"

8 "NO. I CAN'T CONCLUDE THAT. I DIDN'T CONCLUDE THAT."

9 AND HE CAN'T CONCLUDE IT BECAUSE THE DATA DOESN'T SUPPORT
10 IT.

11 THE COURT: LET ME ASK MR. GLACKIN, WHAT IS YOUR BEST
12 EVIDENCE THAT COMPENSATION MOVES TOGETHER ACROSS JOB TITLES?

13 MR. GLACKIN: WELL, THERE'S -- I -- WHAT'S MY BEST
14 EVIDENCE?

15 THE COURT: YES.

16 MR. GLACKIN: I HESITATE BECAUSE I FEEL THE RECORD IS
17 SO RICH AND I'M NOT SURE I CAN ACTUALLY PICK A WINNER.

18 THE COURT: UM-HUM.

19 MR. GLACKIN: YOU KNOW, THERE'S THIS -- THERE'S THE
20 RICH DOCUMENTARY RECORD THAT SHOWS THAT THE DEFENDANTS
21 MODULATED THEIR ENTIRE PAY SYSTEMS AT THE JOB TITLE LEVEL AND
22 THAT THEY SET COMPENSATION ON A BELL CURVE IN A NUMBER OF
23 INSTANCES.

24 BUT IN ADDITION TO THAT, YOU KNOW -- AND AGAIN I HESITATE
25 BECAUSE WE TOOK THE CRITICISMS VERY SERIOUSLY AND WE DIDN'T

1 JUST DO ONE ADDITIONAL STATISTICAL ANALYSIS. WE LOOKED AT THIS
2 FROM FOUR DIFFERENT -- I SHOULD SAY DR. LEAMER STATISTICALLY
3 LOOKED AT IT FROM FOUR DIFFERENT DIRECTIONS. HE LOOKED AT IT
4 ON THE LEVEL OF CONTEMPORANEOUS CORRELATIONS, WHETHER OR NOT
5 THERE'S A SIMPLE CORRELATION, HE LOOKED AT THAT AT THE JOB
6 TITLE LEVEL, AND HE LOOKED AT IT AT THE ENTIRE COMPANY LEVEL BY
7 COMBINING SMALL TITLES INTO GROUPS.

8 THEN HE RAN A MULTIPLE REGRESSION ANALYSIS WHICH ALLOWED
9 THE STRUCTURAL VARIABLES TO COMPETE WITH THE EXTERNAL VARIABLES
10 THAT THE DEFENDANTS SAY ARE SO IMPORTANT, AND THE EXTERNAL
11 VARIABLES LOST. THE STRUCTURAL VARIABLES HAD VERY HIGH
12 COEFFICIENTS, THE EXTERNAL MARKET FORCE VARIABLES HAD VERY LOW
13 COEFFICIENTS, WHICH CONFIRMS AGAIN WHAT WE KNEW FROM THE COMMON
14 FACTORS ANALYSIS, WHICH IS THAT THE MAJORITY OF WHAT THE
15 EMPLOYEES ARE PAID IS DETERMINED BY JOB TITLE.

16 SO HAVING DONE THAT ANALYSIS, IT REALLY IS -- YOU KNOW,
17 HAVING BEEN CRITICIZED FOR ONLY DISPLAYING CHARTS AND NOT
18 LOOKING AT EVERY TITLE IN THE COMPANY, WE HAVE NOW DONE THE
19 ANALYSIS OF LOOKING AT EVERY TITLE IN THE COMPANY, IN THE
20 COMPANIES. WE HAVE DONE MULTIPLE ANALYSES OF EVERY TITLE IN
21 THE COMPANIES, AND NOW THE DEFENDANTS ARE CHERRY PICKING THEIR
22 OWN CHARTS AND SAYING IF YOU LOOK AT THESE CHARTS, YOU SEE
23 THINGS MOVING IN A LOT OF DIFFERENT DIRECTIONS, WHICH WAS
24 EXACTLY WHAT WE WERE TAKEN TO TASK FOR THE FIRST TIME AROUND.

25 THEY HAVEN'T OFFERED A SINGLE -- DR. MURPHY HAS NOT OFFERED

1 A SINGLE LEGITIMATE CRITICISM OF THE MULTIPLE REGRESSION
2 ANALYSIS THAT DR. LEAMER HAS DONE.

3 IT IS, FRANKLY, AMAZING TO ME, AFTER THE YEARS THAT I HAVE
4 DONE THIS, THAT WE DO NOT SEE FROM DR. MURPHY A COMPETING
5 REGRESSION IN WHICH HE HAS ADDED A VARIABLE AND BLOWN THIS
6 REGRESSION UP. THAT'S EXACTLY WHAT HE DID NUMEROUS TIMES IN
7 THE OPENING REPORT. IT IS A STANDARD DEFENSE TACTIC. IT IS --
8 THE FIRST THING THEY DO IS ADD THE S&P 500 TOTAL RETURN INDEX
9 AND SHOW THAT IT BLOWS UP WHATEVER THE PLAINTIFFS' EXPERT IS
10 TRYING TO DO.

11 THERE IS NOT ONE SINGLE EXAMPLE OF THAT KIND OF ATTACK IN
12 HERE, AND IT IS BECAUSE THE REGRESSION IS TELLING THE TRUTH.
13 IT'S BECAUSE THE REGRESSION IS RIGHT, THAT THERE IS THIS
14 RELATIONSHIP BETWEEN THE TITLES OVER TIME, NOT THAT THEY HAVE
15 TO MOVE IN LOCKSTEP EVERY YEAR, BUT THERE IS A STRUCTURE THAT
16 BINDS THESE TITLES TOGETHER OVER TIME.

17 IT'S WHAT THE DEFENDANTS' EMPLOYEES SAY, THEIR H.R.
18 EMPLOYEES SAY, IT'S WHAT THE CEOS SAY, IT'S WHAT THE PEOPLE WHO
19 ENTERED INTO THESE AGREEMENTS SAY, AND IT'S WHAT THE DATA SAYS,
20 AND THEY HAVE NOT EVER ATTACKED THAT ANALYSIS.

21 THEIR ONLY RESORT IS TO GO BACK TO THE INDIVIDUAL LEVEL AND
22 SHOW THINGS MOVING IN A LOT OF DIFFERENT DIRECTIONS AND ACCUSE
23 US OF AVERAGING.

24 THE COURT: SO LET ME GO TO PARAGRAPH 22 OF
25 DR. MURPHY'S REPORT. IT'S ON PAGE 8. WHY IS THE CORRELATION

1 NOT RELEVANT? WHAT IS THE BENEFIT --

2 MR. VAN NEST: WHAT HE'S SAYING, YOUR HONOR -- AND
3 OBVIOUSLY DR. MURPHY IS HERE IF YOU WANT TO HEAR FROM HIM, AND
4 HE CAN PROBABLY EXPLAIN THIS BETTER THAN I CAN -- BUT THE
5 FUNDAMENTAL POINT IS THAT CORRELATION OF -- THIS CORRELATION
6 STUDY OR TEST IS MEANINGLESS.

7 ALL HE'S SAYING -- ALL LEAMER IS SAYING ON THE CORRELATION
8 IS IF I TAKE THE AVERAGE OF A JOB TITLE AND COMPARE IT TO THE
9 AVERAGE PAY OF CLASS MEMBERS AT THAT COMPANY, I SEE A
10 CORRELATION.

11 WELL, OBVIOUSLY BOTH THE TITLES AT THE COMPANY AND ALL THE
12 EMPLOYEES IN THE TECH GROUP AT THE COMPANY, THEY'RE ALL SUBJECT
13 TO THE SAME EXACT EXTERNAL FACTORS, HOW WELL DID THE COMPANY DO
14 THAT YEAR, HOW WELL IS THE ECONOMY DOING, WHAT'S THE JOB
15 MARKET --

16 THE COURT: BUT WHAT'S THE BENEFIT OF --

17 MR. VAN NEST: THERE ISN'T.

18 THE COURT: -- MEASURING THE DEVIATION? WHAT'S THAT
19 BENEFIT?

20 MR. VAN NEST: THERE'S NO -- THERE'S NO BENEFIT IN
21 DETERMINING WHETHER THERE'S A RIGID JOB STRUCTURE. THE
22 CORRELATION DOESN'T TELL YOU THAT.

23 THAT'S WHY DR. LEAMER SAYS "I CAN'T TELL YOU THAT CHANGES
24 TO SOME EMPLOYEES WOULD PROPAGATE." THERE'S NO -- WHAT
25 DR. MURPHY IS SAYING IS CORRELATION, IN THIS CONTEXT WHERE

1 YOU'RE COMPARING A TITLE TO THE REST OF THE EMPLOYEES AT THE
2 COMPANY, THAT WILL MOVE TOGETHER WHETHER THE STRUCTURE IS RIGID
3 OR NOT BECAUSE THEY'RE ALL SUBJECT TO THE SAME SET OF FACTORS.

4 AND WHEN YOU LOOK AT EXHIBIT 8, OR FIGURE 8 AND FIGURE 7,
5 HE TESTED THE THEORY. WHAT HAPPENS WHEN YOU LOOK AT THESE TOP
6 50 TITLES? DO THEY ALL SEEM TO -- IS THERE A TIGHT, RIGID
7 PATTERN?

8 ABSOLUTELY NOT. THERE'S HUGE VARIATION.

9 THE COURT: WHY ISN'T ALL THIS MERITS ANALYSIS FOR
10 LATER?

11 MR. VAN NEST: BECAUSE COMCAST AND ELLIS TELL US THAT
12 THE STANDARD FOR ESTABLISHING CERTIFIABILITY IN (B)(3) IS
13 EXTREMELY HIGH.

14 YOU ASKED EARLIER ABOUT CASE LAW. COMCAST CITES DUKES AND
15 IT SAYS DUKES APPLIES WITH EVEN MORE FORCE IN (B)(3), AND IF
16 YOU WANT TO CERTIFY A CLASS OF 60,000 PEOPLE WITH 2400 --

17 THE COURT: OKAY. BUT DUKES HAD NO DOCUMENTARY
18 EVIDENCE. DUKES HAD A SOCIOLOGIST TALKING ABOUT WAL-MART
19 CULTURE.

20 MR. VAN NEST: WELL, LOOK AT --

21 THE COURT: IT HAD 120 ANECDOTES FROM WOMEN
22 EMPLOYEES.

23 MR. VAN NEST: LOOK AT ELLIS.

24 THE COURT: THEY HAD STATISTICS. THEY DID NOT HAVE
25 THE WEALTH OF DOCUMENTARY EVIDENCE THAT EXISTS HERE.

1 MR. VAN NEST: BUT -- BUT AGAIN, YOUR HONOR --

2 THE COURT: YEAH.

3 MR. VAN NEST: I DON'T WANT TO DISPUTE THAT THERE'S
4 DOCUMENTARY EVIDENCE THAT PEOPLE WERE TALKING ABOUT AGREEMENTS.

5 BUT THERE'S NO DOCUMENTARY EVIDENCE OF ANY COMMON IMPACT
6 ACROSS THE CLASS. THERE'S NO EVIDENCE IN DOCUMENTS OF REALLY
7 ANY IMPACT.

8 THERE MAY BE EVIDENCE OF INTENT. THERE MAY BE EVIDENCE OF
9 PEOPLE TALKING TOGETHER, OF COURSE. WE'VE REVIEWED THAT LAST
10 TIME. THAT EVIDENCE IS COMMON.

11 THE POINT HERE IS THAT IF YOU HAVE TO SHOW, AS COMCAST
12 REQUIRES AND ELLIS --

13 THE COURT: ANYWAY, OKAY.

14 MR. VAN NEST: SO --

15 THE COURT: LET ME GIVE MR. GLACKIN AN OPPORTUNITY TO
16 RESPOND TO THIS ISSUE ABOUT IS IT BETTER TO MEASURE DEVIATION
17 VERSUS THE CORRELATION?

18 MR. GLACKIN: CAN YOU POINT ME TO EXACTLY --

19 THE COURT: IT'S PARAGRAPH 22. IT'S ON PAGE 8 OF
20 DR. MURPHY'S --

21 MR. GLACKIN: WELL --

22 THE COURT: -- JUNE 2013 REPORT.

23 MR. GLACKIN: OKAY, YEAH, I UNDERSTAND.

24 I MEAN, THIS IS -- YOU KNOW, SO THIS IS THE HEART OF DR.,
25 OF DR. MURPHY'S CRITICISM, SO TO SPEAK, IS HE'S SAYING

1 DEVIATION REALLY MATTERS.

2 AND WHAT IS HIS EXPLANATION FOR WHY DEVIATION REALLY
3 MATTERS? YOU MIGHT HAVE LOOKED LONG AND HARD FOR IT. I THINK
4 SOMEWHERE IN HIS REPORT HE SAYS BASIC ECONOMICS.

5 AND WHAT HE EXPLAINED AT HIS DEPOSITION IS THAT THE REASON
6 DEVIATION MATTERS IS THAT IT SHOWS THAT IT IS POSSIBLE FOR THE
7 DEFENDANTS TO PAY THEIR EMPLOYEES DIFFERENTLY. THAT IS WHAT IT
8 SHOWS.

9 AND IF IT IS POSSIBLE FOR DEFENDANTS TO PAY THEIR EMPLOYEES
10 DIFFERENTLY, THEN THEY WILL TRY TO PAY THEM AS LITTLE AS
11 POSSIBLE, EVEN IN RESPONSE TO COMPETITION.

12 THAT IS WHAT I UNDERSTAND TO BE HIS, THE THEORY BEHIND HIS
13 ECONOMICS.

14 AND I -- MY RESPONSE TO THAT IS WE ARE WAY BEYOND BASIC
15 ECONOMICS. WE ARE WAY BEYOND TALKING REASONABLY ABOUT A
16 SITUATION WHERE EVERY COMPANY FACES OFF AGAINST ITS INDIVIDUAL
17 EMPLOYEES IN ONE-ON-ONE NEGOTIATIONS AND JUST DOES A SIMPLE
18 COST MINIMIZATION FORMULA.

19 IT IS UNDISPUTED BY ANY OF THE EXPERTS AT THIS POINT THAT
20 THESE COMPANIES USE PAY STRUCTURES, THAT INFORMATION ECONOMICS
21 AND THE PRINCIPLES OF INTERNAL EQUITY ARE IMPORTANT FACTORS IN
22 HOW THESE COMPANIES PAY THEIR EMPLOYEES.

23 SO WHAT DR. MURPHY IS DOING IS SIMPLY SAYING, "WELL, IF I
24 LIVED IN A WORLD WHERE NONE OF THOSE THINGS MATTERED AND THE
25 WAY GOOGLE PAID ITS EMPLOYEES WAS TO SIT DOWN ACROSS THE TABLE

1 FROM THEM AND NEGOTIATE A SALARY AND THERE WAS NOTHING ELSE
2 THAT MATTERED TO THAT CALCULUS, THEN GOOGLE WOULD HAVE AN
3 INCENTIVE TO PAY THAT EMPLOYEE AS LITTLE AS POSSIBLE." IT'S
4 JUST AN IRRELEVANT HYPOTHETICAL.

5 MR. VAN NEST: IF I MAY --

6 THE COURT: WHAT ABOUT WHAT IS MR. VAN NEST'S TAB 5?
7 I HAD SOME QUESTIONS ABOUT THESE CHARTS.

8 THE FIRST QUESTION IS, IN FOOTNOTE 10, DR. MURPHY SAYS,
9 "I'M INCLUDING PEOPLE WHO GOT PROMOTIONS AND WHO BASICALLY LEFT
10 ONE JOB TITLE AND MOVED TO ANOTHER ONE." SHOULD THOSE PEOPLE
11 BE INCLUDED HERE? BECAUSE THAT COULD EXPLAIN A LOT OF THE
12 VARIATION AS WELL IF YOU'RE TRACKING OVER TIME PEOPLE WHO ARE
13 IN MULTIPLE JOB TITLES. THAT COULD EXPLAIN SOME OF THE
14 VARIATION.

15 MR. VAN NEST: I THINK -- IT COULD.

16 BUT THIS VARIATION IS ENORMOUS, YOUR HONOR, AS YOU CAN SEE.
17 ALL WE'RE DOING HERE IS LOOKING AT EMPLOYEES WITHIN EACH OF
18 THESE JOB TITLES IN A PARTICULAR YEAR. SO THIS IS JUST ONE
19 YEAR. THIS ISN'T OVER TIME. THIS IS IN 2007.

20 SO YOU CAN SEE --

21 THE COURT: RIGHT. BUT I GUESS I'M -- BUT HE SAYS IN
22 THE FOOTNOTE THAT HE INCLUDED PEOPLE THAT CHANGED JOBS.

23 MR. VAN NEST: HE DID.

24 THE COURT: SO --

25 MR. VAN NEST: SO THERE WOULD BE SOME PEOPLE --

1 THE COURT: SO THERE'S GOING TO BE -- SO THERE'S ONE
2 TITLE LISTED ON TOP OF EACH CHART, BUT THAT'S OBVIOUSLY
3 INCORRECT BECAUSE SOME OF THESE PEOPLE HAD DIFFERENT JOB
4 TITLES.

5 MR. VAN NEST: BUT TAKE A LOOK, THOUGH, YOUR HONOR.
6 IF THIS WERE CLOSE, THEN MAYBE WE WOULD BE -- MAYBE WE WOULD BE
7 LOOKING MORE CAREFULLY AT THAT FOOTNOTE.

8 BUT TAKE A LOOK. FOR EACH ONE OF THESE COMPANIES, THERE IS
9 NOT ONLY A HUGE RANGE BETWEEN WHETHER YOU GO UP IN PAY OR GO
10 DOWN --

11 THE COURT: UM-HUM.

12 MR. VAN NEST: -- BUT THERE'S ALSO A HUGE RANGE IN
13 HOW MUCH. SOME OF THESE PEOPLE GO UP AS MUCH AS 75 PERCENT IN
14 A YEAR OR DOWN AS MUCH AS 60 PERCENT, AND THAT'S TRUE FOR
15 APPLE, IT'S TRUE FOR GOOGLE, IT SLIGHTLY LESS TRUE FOR INTUIT.

16 THE COURT: BUT THAT COULD BE EXPLAINED BY YOU
17 GETTING A NEW JOB.

18 MR. GLACKIN: YES.

19 THE COURT: THE QUESTION I HAD ALSO --

20 MR. GLACKIN: DO YOU STILL WANT ME TO RESPOND TO THIS
21 OR NOT?

22 THE COURT: GO AHEAD.

23 MR. GLACKIN: I DON'T THINK WE TAKE SERIOUS ISSUE
24 WITH IT ONE WAY OR ANOTHER.

25 I WILL SAY THAT I THINK THE ANSWER TO THE QUESTION DEPENDS

1 ON -- THE ANSWER TO THAT QUESTION DEPENDS ON WHAT THE RELEVANT
2 QUESTION IS. IF THE QUESTION IS, IS THERE A STRUCTURE HOLDING
3 TOGETHER JOB TITLES, PROBABLY YOU SHOULD EXCLUDE THE PEOPLE WHO
4 CHANGED JOB TITLES.

5 IF THE QUESTION IS, DID THE DEFENDANTS PAY THEIR EMPLOYEES
6 DIFFERENTLY, THEN MAYBE YOU SHOULD INCLUDE THEM.

7 MR. VAN NEST: AND ISN'T THAT THE POINT? ISN'T THAT
8 THE POINT? PROMOTION IS ANOTHER WAY TO RESPOND, YOUR HONOR.

9 MR. GLACKIN: WELL --

10 MR. VAN NEST: PROMOTION IS ANOTHER WAY TO
11 DIFFERENTIATE BETWEEN EMPLOYEES. THAT'S OUR WHOLE POINT --

12 MR. GLACKIN: I RESPECTFULLY -- SORRY.

13 MR. VAN NEST: -- IS THAT WHEN YOU MOVE SOMEONE UP,
14 IT'S ANOTHER TOOL TO DIFFERENTIATE BETWEEN INDIVIDUALS, WHICH
15 IS WHAT -- A TOOL IS SALARY, A TOOL IS BONUS, A TOOL IS EQUITY,
16 AND A TOOL IS PROMOTION.

17 THE COURT: THE DOCUMENTARY EVIDENCE DOES SUPPORT
18 THAT PROMOTION WAS ONE WAY THAT MANAGERS DEALT WITH HOW TO
19 COMPENSATE THE TOP PERFORMERS.

20 MR. GLACKIN: SURE.

21 MR. VAN NEST: AND THAT'S INDIVIDUALS. THAT'S
22 INDIVIDUALS. THAT'S OUR POINT. THAT'S AN INDIVIDUAL THING.

23 AND OUR WHOLE PITCH HERE, AND THE DATA SUPPORT IT, MURPHY'S
24 DATA AND SHAW'S DATA ALL SUPPORT THIS, IS THAT PEOPLE ARE
25 MAKING WIDE DISTINCTIONS IN VARIATIONS AMONG EMPLOYEES WITHIN

1 THE CLASS.

2 THE COURT: UM-HUM.

3 MR. VAN NEST: AND THERE ARE WIDE VARIATIONS BETWEEN
4 THE TITLES, WITHIN THE TITLES AND BETWEEN THE TITLES.

5 THERE ISN'T THIS SORT OF RIGID JOB STRUCTURE THAT THEY SAID
6 THEY WOULD PROVE IN ORDER TO SHOW THAT CHANGES TO SOME WOULD
7 PROPAGATE OUT.

8 THE COURT: LET ME ASK -- AND I'M GOING TO GIVE YOU A
9 CHANCE TO RESPOND.

10 MR. GLACKIN: OKAY. THANK YOU.

11 THE COURT: LAST TIME I GAVE DR. LEAMER A HARD TIME
12 FOR CHERRY PICKING JOB TITLES OUT OF GOOGLE AND APPLE AND
13 NOBODY ELSE.

14 AND THERE CERTAINLY SEEMS TO BE SOME CHERRY PICKING HERE,
15 BECAUSE FOR LUCASFILM, WE'RE COMPARING ARTIST 2 AND SENIOR
16 ARTIST 1 AND SOFTWARE ENGINEER, BUT THEN YOU GO SOMEWHERE ELSE
17 AND WE'RE COMPARING SOMETHING TOTALLY DIFFERENT.

18 WAS AN ANALYSIS DONE FOR ALL THE DIFFERENT JOB TITLES AND
19 THEN YOU JUST PICKED THE TOP THREE FOR EACH COMPANY THAT HAD
20 THE MOST VARIATION? OR WHAT -- IT'S NOT CONSISTENT ACROSS.

21 MR. VAN NEST: I THINK THAT DR. MURPHY WOULD HAVE TO
22 ANSWER THAT.

23 MR. GLACKIN: I CAN TELL YOU WHAT HE SAID AT HIS
24 DEPOSITION IF YOU WANT.

25 THE COURT: WHAT DID HE SAY?

1 MR. GLACKIN: WHAT HE SAID IS HE RAN IT BACK AT THE
2 RANCH, SO TO SPEAK, FOR EVERYTHING. HE PICKED 2007 BECAUSE IT
3 WAS IN THE MIDDLE OF THE CLASS PERIOD, AND HE PICKED -- I
4 THINK -- THE PROBLEM IS THAT -- I THINK IF YOU LOOK IN THE
5 REPORT, HIS REPORT, IT MAY SAY THAT THESE WERE THE MOST
6 POPULATED JOB TITLES AT THESE FIRMS. I'M NOT -- I CAN'T TELL
7 BECAUSE IT'S TAKEN OUT OF THE REPORT, BUT I KNOW THAT WITH
8 RESPECT TO AT LEAST SOME OF THESE CHARTS, THAT WAS HOW HE
9 EXPLAINED HIS SELECTION OF THE JOB TITLES, WHICH IS FINE.

10 THE COURT: ALL RIGHT. DO YOU WANT TO RESPOND TO
11 THIS, TO THESE CHARTS? THEY CERTAINLY SHOW A LOT OF VARIATION
12 WITHIN A YEAR, WITHIN A SINGLE JOB TITLE.

13 MR. VAN NEST: AND APPENDIX B, YOUR HONOR, IS EVERY
14 TITLE, EVERY TITLE. APPENDIX B TO MURPHY, EVERY TITLE.

15 MR. GLACKIN: SO THIS IS MY RESPONSE TO THAT.

16 THE COURT: UM-HUM.

17 MR. GLACKIN: TO ACCEPT THE DEFENDANTS' POSITION, YOU
18 HAVE TO ACCEPT THAT THE EXISTENCE OF VARIATION IN PAY DISPROVES
19 THE EXISTENCE OF A JOB STRUCTURE THAT HOLDS TOGETHER BASED ON
20 INTERNAL EQUITY.

21 AND DR. MURPHY, AT HIS DEPOSITION, WISELY CONCEDED THAT
22 THERE IS NO INCONSISTENCY BETWEEN THOSE TWO THINGS. YOU CAN
23 PAY YOUR EMPLOYEES DIFFERENTLY IN THAT TOP -- YOU KNOW, AT THAT
24 TOP LEVEL IN TERMS OF THE TOP OF THEIR COMPENSATION, BUT STILL
25 HOLD THEM ALL TOGETHER IN A JOB TITLE STRUCTURE.

1 AND THIS WAS -- I MEAN, THIS IS THE QUOTE THAT WE SET OFF
2 FROM HIM. WHEN I ASKED HIM AT HIS DEPOSITION, "ARE YOU SAYING
3 IT'S INCONSISTENT THAT -- ARE YOU SAYING THAT IT'S INCONSISTENT
4 TO HAVE WIDE VARIATION IN PAY AND A STRUCTURE THAT HOLDS
5 TOGETHER ON INTERNAL EQUITY?" HE SAID, "NO, THEY'RE NOT
6 INCONSISTENT."

7 AND WE DRILLED DOWN ON IT AND HE SAID, "YEAH," HE SAID, "I
8 CAN'T TELL YOU THAT THE EXISTENCE OF WIDE VARIATION DISPROVES A
9 JOB STRUCTURE THAT RESPECTS INTERNAL EQUITY. I CAN'T TELL YOU
10 IT DISPROVES IT."

11 AND THIS IS WHEN HE SAID THERE'S NO ABSOLUTES IN STATISTICS
12 AND IF YOU WANT ABSOLUTES, YOU HAVE TO TALK TO GOD.

13 BUT PUTTING ALL THAT ASIDE, THE DEFENDANTS' BRIEF IS SIMPLY
14 NOT CONSISTENT WITH COMMON SENSE. THERE'S NO REASON THAT YOU
15 CAN'T HAVE A STRUCTURE THAT IS HOLDING TOGETHER 90 PERCENT OF
16 THE COMPENSATION WHILE, AT THE SAME TIME, THERE IS VARIATION
17 OVER ON TOP OF THAT TO REFLECT THE FACT THAT PEOPLE ARE OLDER,
18 OR YOUNGER, OR OF DIFFERENT GENDERS, UNFORTUNATELY, OR HAVE
19 PERFORMED BETTER IN A GIVEN YEAR.

20 THERE'S NOTHING INCONSISTENT BETWEEN THOSE TWO THINGS,
21 WHICH IS WHY WE HAVEN'T EVER SAID THERE'S NO VARIATION BETWEEN
22 THE DEFENDANTS' PAYMENT.

23 THE COURT: I GUESS I'M NOT CLEAR. ARE YOU SAYING
24 FOR THE VAST MAJORITY OF PEOPLE, THEIR COMPENSATION WILL MOVE
25 TOGETHER WITHIN JOB TITLE, BUT THEN THERE'S GOING TO BE THE TOP

1 AND THE BOTTOM, THE TOP PERFORMERS, FOR EXAMPLE, AND PEOPLE WHO
2 MAY, FOR WHATEVER REASONS, NOT BE VALUED AS HIGHLY, BUT THOSE
3 WILL VARY THE MOST, BUT THE VAST MAJORITY IN THE MIDDLE IS
4 GOING TO MOVE --

5 MR. GLACKIN: NO, NO, NO.

6 THE COURT: I'M JUST NOT CLEAR ON WHAT YOU'RE SAYING.

7 MR. GLACKIN: WHAT I'M SAYING IS IF YOU LOOK AT ANY
8 INDIVIDUAL EMPLOYEE'S COMPENSATION, HIGH PERFORMER OR LOW
9 PERFORMER, ABOUT 90 PERCENT OF IT IS EXPLAINED BY THEIR JOB
10 TITLE, WHICH MAKES PERFECT SENSE, YOU KNOW, WHEN YOU LOOK AT
11 THE FACT THAT THE DEFENDANTS TRACK ALL THEIR EMPLOYEES IN THE
12 SALARY RANGES THAT ARE NOT INFINITE ON THE TOP OR BOTTOM END.

13 SO WHATEVER EMPLOYEE YOU LOOK AT, HIGH OR LOW, GOOD YEAR,
14 BAD YEAR, MOST OF THEIR COMPENSATION IS EXPLAINED BY THEIR JOB
15 TITLE.

16 I MEAN, AND THAT IS WHY -- THAT IS ONE OF MANY REASONS THAT
17 THE JOB TITLE IS THE RIGHT PLACE TO LOOK FOR A STRUCTURE TO THE
18 DEFENDANTS' COMPENSATION AS A MATTER OF STATISTICS, IN ADDITION
19 TO THE RICH RECORD THAT TELLS US THAT THAT'S THE RIGHT PLACE TO
20 LOOK.

21 THE COURT: CAN WE GO TO DR. LEAMER'S REPLY REPORT,
22 PARAGRAPH 35?

23 MR. VAN NEST: YOUR HONOR, CAN I JUST RESPOND VERY
24 QUICKLY TO WHAT HE JUST SAID?

25 THE COURT: YES.

1 MR. VAN NEST: THE POINT IS WHERE THE JOB TITLE
2 SHOWS -- HAS AN ENORMOUS RANGE OF COMPENSATION WITHIN IT BASED
3 ON SALARY, EQUITY, AND BONUS, WHAT HE SAID MAKES ABSOLUTELY NO
4 DIFFERENCE, AND THAT'S WHY YOU HAVE THE RESULTS THAT YOU HAVE
5 WHEN YOU LOOK AT THE RAW DATA.

6 THE EMPLOYEES' PAY IS WIDELY VARIED YEAR TO YEAR, AND THE
7 TITLES VARY WIDELY YEAR TO YEAR.

8 THE COURT: BUT IT'S --

9 MR. VAN NEST: BECAUSE THERE'S SO MUCH DISCUSSION --
10 THE COURT: BUT IT'S NOT CONSISTENT WITH THE
11 DOCUMENTARY EVIDENCE THAT SAYS HERE ARE THE RANGES, AND IF YOU
12 WANT TO GO ABOVE THIS LEVEL, YOU NEED TO GET ONE ADDITIONAL
13 LEVEL OF APPROVAL, OR THAT --

14 MR. VAN NEST: IT IS CONSISTENT -- EXCUSE ME, YOUR
15 HONOR.

16 THE COURT: GO AHEAD.

17 MR. VAN NEST: I APOLOGIZE.

18 IT'S CONSISTENT WITH THE LEVEL -- YOU CAN LOOK AT
19 DR. HALLOCK'S FIGURE 7. SOME OF THE RANGES ARE \$100,000,
20 \$50,000. THAT'S THE RANGE OF SOME OF THESE JOB TITLES. THAT'S
21 JUST SALARY, NOT INCLUDING BONUS AND EQUITY.

22 THE REASON THAT YOU HAVE SOMETHING LIKE TABS 4, 5, AND 6 IS
23 THAT THERE IS AN ENORMOUS RANGE WITHIN EACH JOB TITLE.

24 NO ONE IS DENYING THAT THE DEFENDANTS HAVE STRUCTURES AND
25 THAT THEY PAY PEOPLE WITHIN JOB TITLES.

1 BUT JOB TITLES, LIKE EVERYTHING ELSE, ARE BASED ON
2 PERFORMANCE, AND WHEN YOU PERFORM OUT OF ONE, YOU MOVE INTO
3 ANOTHER.

4 AND EVEN WITHIN A JOB TITLE, AS YOU CAN SEE IN TAB 4,
5 THERE'S MOVEMENT EVERY YEAR, UP AND DOWN. THERE'S MOVEMENT A
6 LOT, THERE'S MOVEMENT A LITTLE, AND THAT'S WHY THERE'S SO MUCH
7 VARIABILITY. THAT'S WHY DR. LEAMER CAN'T SAY THAT HE CAN
8 CONCLUDE IMPACT TO SOME WOULD TRANSLATE TO IMPACT FOR OTHERS.

9 SOME OF THESE BANDS, JUST BASED ON BASE SALARY, ARE 50 TO
10 \$100,000. THAT DOESN'T COUNT EQUITY.

11 THE COURT: WELL, THERE'S CERTAINLY A LOT OF
12 DOCUMENTARY EVIDENCE THAT SAYS WHAT THE SPECIFIC BAND IS FOR
13 EACH JOB TITLE FOR ALL OF THE DIFFERENT DEFENDANTS.

14 MR. VAN NEST: TRUE.

15 THE COURT: SO ANYWAY. LET ME GO TO, PLEASE,
16 PARAGRAPH 35.

17 MR. GLACKIN: THIS IS THE REBUTTAL, SUPPLEMENTAL
18 EXPERT REPORT?

19 THE COURT: I'M SORRY, NO. THIS IS HIS ORIGINAL.
20 LET'S GO TO THE MULTIPLE REGRESSION ANALYSIS.

21 MR. GLACKIN: SURE.

22 MR. VAN NEST: I'VE GOT IT, TINA.

23 THE COURT: THIS IS WHERE HE WAS COMPARING THE
24 INTERNAL VERSUS THE EXTERNAL FACTORS.

25 MR. GLACKIN: RIGHT.

1 THE COURT: SO DO WE HAVE TO COMPARE THE MAGNITUDE OF
2 THE COEFFICIENTS FOR THE INTERNAL FACTORS RELATIVE TO THE
3 COEFFICIENTS FOR THE EXTERNAL FACTORS?

4 MR. GLACKIN: WELL, SO I DON'T THINK IT'S NECESSARY.
5 I THINK, YOU KNOW, THE WAY THAT THIS -- THE WAY THAT THIS
6 REGRESSION WORKS IS THAT IF THE DEFENDANTS WERE RIGHT THAT
7 EVERYBODY'S PAY IS COMPLETELY DETERMINED BY EXTERNAL FACTORS,
8 SUCH AS FIRM REVENUE OR PERFORMANCE OF THE FIRM OR THINGS GOING
9 ON IN THE GENERAL TECH JOB MARKET, IF YOU INCLUDE THOSE FACTORS
10 AND THEN YOU ALSO INCLUDE THE SHARING VARIABLES AND YOU RUN THE
11 REGRESSION AND THE SHARING VARIABLES STAY POSITIVE, IF THEY
12 DON'T ALL JUST GO AWAY, THEN YOU'VE STILL DETECTED THE
13 EXISTENCE OF A STRUCTURE.

14 BUT I DO THINK IT IS WORTH NOTING HERE THAT IN MANY CASES,
15 I BELIEVE IN -- I BELIEVE, OVERALL, THAT THE SHARING VARIABLES
16 DID BETTER AND PERFORMED BETTER IN DR. LEAMER'S OPINION THAN
17 THE EXTERNAL FACTOR VARIABLES.

18 SO I DON'T THINK THAT, YOU KNOW, STRICTLY SPEAKING YOU HAVE
19 TO COMPARE THE MAGNITUDE.

20 IF THE ONLY THING THAT MATTERED WAS THE EXTERNAL FACTORS,
21 WHEN YOU RAN THE REGRESSION YOU WOULD GET BACK BIG RESULTS ON
22 THE EXTERNAL FACTORS AND YOU WOULD GET BACK ZERO ON THE SHARING
23 VARIABLES BECAUSE THE EXTERNAL FACTORS ARE ACCOUNTING FOR
24 EVERYTHING.

25 THE COURT: DO THE DEFENDANTS AGREE THAT THE

1 MAGNITUDE OF THE SHARING EFFECT VARIABLES IS LARGER THAN THE
2 EXTERNAL ONES?

3 MR. VAN NEST: NO, YOUR HONOR. WE -- OUR POINT --
4 THEY'RE NOT SIGNIFICANT. THEY'RE NOT SIGNIFICANT AT ALL,
5 NUMBER ONE.

6 AND NUMBER TWO, AGAIN, WHAT DR. MURPHY SAYS ABOUT THIS
7 REGRESSION IS YOU WOULD EXPECT THE SAME RESULT WHETHER YOU HAD
8 A RIGID STRUCTURE OR A NON-RIGID STRUCTURE, BECAUSE IF WHAT
9 YOU'RE COMPARING IS A TITLE WITHIN ONE COMPANY TO THE SALARIES
10 AVERAGED OF ALL TECHNICAL EMPLOYEES IN THAT COMPANY, THERE'S
11 ALWAYS GOING TO BE SOME CORRELATION BECAUSE THEY'RE ALL SUBJECT
12 TO THE SAME EXTERNAL FACTORS, COMPANY PERFORMANCE, ECONOMY.

13 SO THEY'RE -- THESE ARE NOT SIGNIFICANT, AND WE SHOW THIS
14 IN FIGURE 8 OF -- YOU CAN SEE IT IN FIGURE 8 OF DR. LEAMER'S
15 REPORT. HE'S SAYING A LARGE NUMBER, ADOBE, 75 PERCENT, NOT
16 SIGNIFICANT.

17 APPLE, 62 PERCENT, NOT SIGNIFICANT.

18 MR. GLACKIN: I --

19 MR. VAN NEST: GOOGLE, 69 PERCENT, NOT SIGNIFICANT.

20 I MEAN, THEY'RE NOT -- AND BOTTOM LINE, WHAT I HAVE AT
21 TAB 8 IS LEAMER'S ADMISSION THAT AFTER ALL OF THE REGRESSIONS
22 HE DID, HE CANNOT TESTIFY THAT THERE'S ANYTHING THAT WOULD SHOW
23 CHANGES IN WAGES BEING TRANSLATED ACROSS THE FIRM.

24 THAT'S WHAT -- THAT'S THE POINT. THAT'S WHAT HE'S TRYING
25 TO SHOW. THAT'S WHAT YOU CHALLENGED HIM ON LAST TIME IS CAN

1 YOU SHOW, TITLE TO TITLE, THAT ONE TITLE CAUSES ANOTHER TITLE
2 TO MOVE? OR THAT A CHANGE IN PAY IN ONE TITLE WOULD CAUSE
3 ANOTHER TITLE TO MOVE?

4 THE POINT ISN'T, DO WE HAVE A STRUCTURE?

5 IT'S, IS THE STRUCTURE RIGID OR IS IT FLEXIBLE?

6 AND WHAT DR. LEAMER ADMITTED IN HIS DEPOSITION AT PAGES
7 658 TO 660 WAS THAT EVEN THE COEFFICIENTS THAT HE SHOWS DO NOT
8 DEMONSTRATE THAT A CHANGE IN WAGES WOULD BE TRANSLATED ACROSS
9 THE FIRM.

10 SAME THING IN TAB 9. WE ASKED HIM AGAIN, "BASED ON
11 EVERYTHING YOU DID, CAN YOU TELL US THAT WHEN A COMPANY CHANGES
12 THE PAY OF SOME PEOPLE, IT PROPAGATES TO EVERYONE ELSE?"

13 "NO, I CAN'T DO THAT. AND THAT'S NOT MY VIEW."

14 THE QUESTION ISN'T, DO WE HAVE A STRUCTURE? EVERY COMPANY
15 HAS TO HAVE SOME STRUCTURE FOR PAYING 50 TO 100,000 PEOPLE.

16 THE QUESTION IS, IS THE STRUCTURE RIGID AND DOES A CHANGE
17 IN ONE TITLE CAUSE A CHANGE IN ANOTHER TITLE?

18 AND ALL THE EVIDENCE IS TO THE SAME EFFECT, NO.

19 THE COURT: HAS DR. MURPHY DONE ANY STUDIES OR ANY
20 QUANTITATIVE ANALYSIS SHOWING WHAT THE RELATIONSHIP MAY BE
21 BETWEEN SAN JOSE EMPLOYMENT RATES AND THE AVERAGE COMPENSATION
22 FOR A TECHNICAL CLASS MEMBER?

23 MR. VAN NEST: I'M NOT SURE WHETHER HE'S DONE THAT OR
24 NOT. HE'S HERE. I'M NOT SURE WHETHER HE'S DONE THAT ANALYSIS
25 OR NOT.

1 MR. GLACKIN: IT'S CERTAINLY NOT IN HIS REPORT.

2 THE COURT: UM-HUM.

3 MR. GLACKIN: I MEAN, LIKE, IF DR. MURPHY HAD A
4 BETTER VARIABLE, RIGHT, IF SAN JOSE METRO AREA EMPLOYMENT WAS
5 THE WRONG VARIABLE, HE CERTAINLY HAD THE OPPORTUNITY TO TAKE
6 THE SAME REGRESSION AND PUT A DIFFERENT VARIABLE IN IT.

7 MR. VAN NEST: NO. HIS POINT ISN'T THAT THERE'S --

8 MR. GLACKIN: EXCUSE ME. I WASN'T FINISHED.

9 MR. VAN NEST: I'M SORRY.

10 MR. GLACKIN: I WAS ANSWERING THE JUDGE'S, WHAT I
11 UNDERSTOOD THE COURT'S QUESTION TO BE.

12 HE DID NOT DO THAT. HE DID NOT RE-RUN THIS REGRESSION WITH
13 A, QUOTE UNQUOTE, BETTER VARIABLE.

14 INSTEAD HE WENT TO OTHER DATA SETS, LIKE THE WEATHER, AND
15 TRIED TO SHOW THAT HE CAN GET --

16 THE COURT: I WAS NOT PERSUADED.

17 MR. GLACKIN: -- SIMILAR RESULTS.

18 AND AGAIN, THE ABSENCE OF THAT, THE ABSENCE -- I MEAN, YOU
19 REMEMBER HE TESTIFIED AT HIS DEPOSITION THE FIRST TIME AROUND
20 THAT ADDING THE S&P 500 TOTAL RETURN INDEX IS SOMETHING HE
21 ALWAYS DOES TO TEST THE SENSITIVITY OF A REGRESSION AND WE HAD
22 TO, YOU KNOW, SLOG THROUGH MULTIPLE DIFFERENT REPORTS OF
23 REGRESSION RESULTS USING THINGS LIKE THE S&P 500 TOTAL RETURN
24 INDEX AND GIVING US CRAZY ANSWERS. HE HASN'T DONE THAT IN ANY
25 RESPECT.

1 THE BEST HE CAN DO IS SAY THAT IF YOU HYPOTHESIZE THAT WE
2 HAVE FAILED TO ACCOUNT FOR HALF OF THE RELEVANT FACTORS, THEN
3 THE ANSWER WOULD BE DIFFERENT.

4 WELL, I AGREE. IF YOU HYPOTHESIZE THAT, THEN THERE MIGHT
5 BE A DIFFERENT ANSWER.

6 BUT HE HAS NOT DONE THE STANDARD THING THAT, FRANKLY, I
7 THINK IT SPEAKS VOLUMES THAT HE DID NOT DO.

8 MR. VAN NEST: YOUR HONOR, THE REASON YOU WOULDN'T DO
9 IT IS THAT OBVIOUSLY IF WHAT YOU'RE TRYING TO COMPARE IS PAY
10 WITHIN ONE TITLE ON AN AVERAGE TO PAY WITHIN ALL TECHNICAL
11 EMPLOYEES IN A COMPANY, A REGRESSION DOESN'T ANSWER THE
12 QUESTION BECAUSE THEY WILL ALWAYS BE RELATED. THEY WILL ALWAYS
13 BE RELATED BECAUSE THEY'RE ALL SUBJECT TO THE SAME EXTERNAL SET
14 OF FACTORS.

15 WHAT THEY FAILED TO SHOW WAS THAT A CHANGE IN ONE TITLE
16 WOULD CAUSE A CHANGE IN ANOTHER. DR. LEAMER DOESN'T SAY THAT.
17 IN FACT, HE SAYS, "I DON'T THINK IT'S TRUE."

18 AND THAT IS GAME OVER BECAUSE THE WHOLE POINT IS NOT THAT
19 YOU HAVE A STRUCTURE, NOT THAT YOU PAY PEOPLE ACCORDING TO
20 TITLE. WE DO THAT.

21 BUT IS IT RIGID SO THAT EITHER WITHIN A TITLE OR ACROSS
22 TITLES, A CHANGE IN ONE WOULD PROPAGATE OUT?

23 THERE'S NO DATA TO SUPPORT THAT.

24 THE COURT: SO WHAT -- I'M SORRY TO INTERRUPT YOU.

25 MR. VAN NEST: I'M SORRY.

1 THE COURT: WHAT IS YOUR EVIDENCE OF CAUSATION? IS
2 IT THE DOCUMENTARY EVIDENCE? WHAT DO YOU HAVE ON CAUSATION?

3 MR. GLACKIN: INSOFAR AS THAT IS DIFFERENT FROM
4 IMPACT? I GUESS -- I MEAN, I THINK OF -- I THINK ANTITRUST
5 IMPACT AND CAUSATION ARE -- PEOPLE FREQUENTLY COMPARE ANTITRUST
6 IMPACT TO THE CONCEPT OF PROXIMATE CAUSATION IN GENERAL TORT,
7 SO I THINK THAT IT IS THE SAME EVIDENCE.

8 THE COURT: AND WHAT IS IT? WHAT IS IT THAT SHOWS
9 THE CAUSATION? LET'S SAY I ACCEPT THAT THERE'S A CORRELATION.

10 MR. GLACKIN: OKAY.

11 THE COURT: WHAT'S THE CAUSATION?

12 MR. GLACKIN: WELL, THE EVIDENCE -- AGAIN, IT HELPS
13 TO BACK UP A LITTLE BIT TO WHERE, TO WHERE WE STARTED.

14 THE COURT: UM-HUM.

15 MR. GLACKIN: WHAT I UNDERSTOOD THE INQUIRY TO BE IS,
16 YOU KNOW, WE HAD DONE THE WORK TO SHOW THAT PEOPLE'S PAY AT
17 THESE COMPANIES, CLASS MEMBERS' PAY IS MAINLY DRIVEN BY JOB
18 TITLE.

19 AND WE HAD DONE THE WORK TO SHOW THAT THE -- TO AT LEAST
20 OFFER PROOF THAT THE AGREEMENTS HAD A BROAD AND GENERALIZED
21 EFFECT, WHICH WAS THE ADMISSIONS OF THE CEOS, THE DOCUMENTS,
22 THE NATURE OF THE AGREEMENTS THEMSELVES, AND THE REGRESSION
23 ANALYSIS.

24 THEY ALL SHOWED THAT THE INTENT AND THE ACTUAL EFFECT OF
25 THESE AGREEMENTS -- I MEAN, THIS IS PROOF -- I UNDERSTAND THAT

1 THE DEFENDANTS WILL DISPUTE IT AT TRIAL -- BUT IT IS PROOF THAT
2 THESE AGREEMENTS HAD AN EFFECT BEYOND ONE WORKER.

3 THE THING THAT I UNDERSTOOD TO BE MISSING FROM THE COURT'S
4 PERSPECTIVE WAS SOME OF THE INFERENTIAL LINKS ALONG THE WAY,
5 AND SO WHAT WE HAVE DONE IS TO SHOW -- AND MAINLY ABOUT WHETHER
6 OR NOT THERE IS ACTUALLY A TITLE STRUCTURE THAT IS RESPECT --
7 THAT RESPECTS INTERNAL EQUITY AND THAT APPLIES THROUGHOUT THE
8 FIRM. THAT'S THE QUESTION THAT WE UNDERSTOOD TO BE POSED.

9 AND WE HAVE, I THINK, ANSWERED IT.

10 SO I WOULD SAY THAT IT IS -- IT IS ALL THAT EVIDENCE. WHAT
11 IS THE EVIDENCE OF CAUSATION? IT IS THE EVIDENCE THAT THEY PAY
12 ACCORDING TO TITLE? IT IS THE EVIDENCE OF BROAD AND GENERAL
13 EFFECT, INCLUDING THE EVIDENCE -- ADMISSIONS BY THE CEOS THAT
14 THEY HAVE A PAY STRUCTURE AND THAT THE GOAL OF THE AGREEMENTS
15 WAS TO PROTECT THE PAY STRUCTURE?

16 AND THEN IT IS ALL THE INFERENTIAL LINKS IN BETWEEN THAT
17 SHOW THAT HAD PREEMPTIVE MEASURES BEEN TAKEN BY THESE COMPANIES
18 TO RESPOND TO INCREASED COMPETITION, THAT THESE PREEMPTIVE
19 MEASURES WOULD HAVE APPLIED ACROSS THE FIRM.

20 AND TO RESPOND TO ONE THING THAT MR. VAN NEST SAID, I
21 BELIEVE, IF HE'S STILL REFERRING TO TAB 8 OF DR. LEAMER'S
22 TESTIMONY, HE'S OVERSTATING IT.

23 I DON'T THINK DR. LEAMER WAS EVER ASKED, NOR DID HE EVER
24 TESTIFY, ABOUT WHETHER MOVING A TITLE'S COMPENSATION WOULD
25 AFFECT THE REST OF THE FIRM.

1 THE DOCUMENTARY EVIDENCE, I THINK, SHOWS THAT AT SOME OF
2 THESE FIRMS IT WOULD HAVE, BECAUSE THEY -- BECAUSE THEY SET ALL
3 THEIR TITLES AS A PERCENTILE OFF OF RADFORD, AND SO THE WAY
4 THAT THEY WOULD MOVE THE TITLES IS TO CHANGE THE PERCENTILE
5 THAT THEY WERE PEGGING OFF OF RADFORD.

6 WHAT DR. LEAMER WAS ASKED OVER AND OVER AGAIN IS, "ARE YOU
7 SAYING THAT IF ONLY A FEW PEOPLE'S PAY CHANGED, THAT IT WOULD
8 AFFECT THE WHOLE FIRM?" AND HE'S NEVER OFFERED THAT OPINION
9 AND THAT IS NOT OUR THEORY OF THE CASE AND THAT IS NOT HIS
10 OPINION.

11 THE COURT: BUT WHAT'S YOUR EVIDENCE OF CAUSATION
12 ACROSS JOB TITLES?

13 MR. GLACKIN: WELL, AGAIN, THE EVIDENCE OF CAUSATION
14 IS THE EVIDENCE THAT THESE, THAT THESE FIRMS RESPECT THE
15 PRINCIPLE OF INTERNAL EQUITY AND THAT THE TITLES ARE HELD
16 TOGETHER IN A STRUCTURE, IN PART TO PRESERVE INTERNAL EQUITY.

17 THE COURT: BUT ISN'T INTERNAL EQUITY ALL WITHIN THE
18 JOB TITLE?

19 MR. GLACKIN: NO, IT'S NOT. INTERNAL EQUITY OPERATES
20 AT DIFFERENT -- AT EVERY LEVEL OF THE COMPANY. I MEAN, THE --
21 MAINTAINING A RELATIVE DISTANCE BETWEEN THE JOB TITLES IS JUST
22 AS IMPORTANT AS MAINTAINING THE RIGHT DISTANCE BETWEEN THE
23 EMPLOYEES WITHIN THE JOB TITLE.

24 SO INTERNAL EQUITY IS A CONCEPT THAT APPLIES UP AND DOWN
25 THE FIRM AT EVERY LEVEL OF AGGREGATION.

1 THE COURT: OKAY. BUT WHAT IS YOUR EVIDENCE OF
2 CAUSATION ACROSS THE JOB TITLES? LET'S SAY I ASSUME THAT THERE
3 IS A CORRELATION. WHAT WOULD -- WHAT WOULD YOUR CAUSATION
4 EVIDENCE BE?

5 MR. GLACKIN: WELL, THE CAUSATION EVIDENCE, IN
6 ADDITION TO THE CORRELATION, IS THE CONDUCT REGRESSION WHICH IS
7 EVIDENCE OF BROAD AND GENERALIZED -- IN ADDITION TO BEING AN
8 ESTIMATE OF DAMAGES, IT IS EVIDENCE OF BROAD AND GENERALIZED
9 HARM.

10 AND SO THE COMBINATIONS -- AGAIN, I DON'T WANT TO JUST KEEP
11 SAYING THE DOCUMENTS AND THE CEOS OVER AND OVER AGAIN. YOU
12 KNOW ABOUT THAT STUFF. I WOULD SAY THAT'S ALSO EVIDENCE OF
13 CAUSATION.

14 BUT WHEN YOU TAKE THE CONDUCT -- STATISTICALLY WHEN YOU
15 TAKE THE CONDUCT REGRESSION AND YOU ADD IT THE CORRELATION
16 ANALYSIS, YOU CONCLUDE THAT THE BROAD AND GENERAL HARM WOULD
17 HAVE BEEN FELT THROUGHOUT THE COMPANY AND NOT CONCENTRATED AT
18 HALF THE TITLES, FOR EXAMPLE. THAT WAS THE INQUIRY THAT WE
19 UNDERSTOOD.

20 THE COURT: DO YOU THINK THAT THE CORRELATION
21 ANALYSIS AND THE REGRESSION ANALYSIS PROVES THE CAUSATION, OR
22 NOT?

23 MR. GLACKIN: SO I THINK THAT THE CONDUCT REGRESSION,
24 WHICH IS ALSO THE ESTIMATE OF DAMAGES, WHEN ADDED TO THE OTHER
25 STATISTICAL EVIDENCE PROVES CAUSATION, WHICH I UNDERSTAND TO BE

1 THE SAME THING AS ANTITRUST IMPACT.

2 THE COURT: THE CONDUCT REGRESSION AND WITH WHAT
3 OTHER STATISTICAL EVIDENCE?

4 MR. GLACKIN: WITH THE EVIDENCE THAT ALL THE TITLES
5 AT THESE FIRMS HAVE A POSITIVE SHARING RELATIONSHIP WITH ONE
6 ANOTHER, BOTH CONTEMPORANEOUSLY AND OVER TIME. THAT IS
7 EVIDENCE THAT THE EFFECT OF THESE AGREEMENTS WOULD HAVE BEEN
8 CLASS-WIDE.

9 THE COURT: EVIDENCE THAT ALL TITLES HAVE POSITIVE
10 SHARING RELATIONSHIPS OVER TIME?

11 MR. GLACKIN: AND I WANT TO BE -- I SHOULD BE
12 CAREFUL. I MEAN, DR. LEAMER NOTED THAT THERE ARE A FEW TITLES
13 THAT HAVE NEGATIVE RELATIONSHIPS, BUT HE ALSO -- HE EXPLORED
14 THOSE TITLES, EXPLAINED WHY IT'S NOT SURPRISING TO FIND SOME
15 THAT HAVE NEGATIVE RELATIONSHIPS, AND EXPLAINED THAT HIS
16 OVERALL OPINION IS THAT THOSE TITLES ARE HELD TOGETHER THAT
17 WAY, AS IS DR. HALLOCK'S OPINION BASED ON THE EVIDENTIARY
18 RECORD.

19 THE COURT: SO WHAT IS THE -- SO FOR THE COEFFICIENT,
20 YOUR CASE IS PROVEN IF THE NUMBER IS CLOSEST TO 1? IS THAT
21 RIGHT? AND FOR THE T-STAT, WHAT NUMBER IS IT TO BE
22 STATISTICALLY SIGNIFICANT?

23 MR. GLACKIN: SO FOR -- OKAY. SO LET ME TAKE THE
24 SECOND THING FIRST BECAUSE IT RELATES TO SOMETHING THAT
25 MR. VAN NEST WAS TALKING ABOUT BEFORE.

1 HE CALLED THE COURT'S ATTENTION TO NOT SIGNIFICANT, TO THE
2 NOT SIGNIFICANT COLUMN IN THE REGRESSION ANALYSIS, SO THAT
3 MEANS THAT THOSE RESULTS DON'T MEET STATISTICAL SIGNIFICANCE AT
4 CONVENTIONAL LEVELS.

5 A T-STAT OF 2 OR MORE IS STATISTICAL SIGNIFICANCE AT
6 CONVENTIONAL LEVELS.

7 HOWEVER, THE FACT THAT WE DON'T -- THE POINT ISN'T THAT --
8 IT'S NOT NECESSARY TO DR. LEAMER'S OPINION THAT ALL THE
9 COEFFICIENTS BE POSITIVE, ALTHOUGH THE VAST MAJORITY ARE; NOR
10 IS IT NECESSARY TO HIS OPINION THAT THEY ALL BE STATISTICALLY
11 SIGNIFICANT.

12 WHAT THE TOTAL PICTURE OF VAST, VASTLY POSITIVE
13 COEFFICIENTS AND VASTLY STATISTICALLY SIGNIFICANT COEFFICIENTS
14 WHERE YOU HAVE 11 YEARS OF DATA TELLS HIM THAT THIS STRUCTURE
15 DOES EXIST.

16 AND I'LL JUST POINT OUT THAT IT'S, AGAIN, IT'S SORT OF --
17 IT'S SORT OF ESTABLISHED AGREEMENT IN THIS CASE AT THIS POINT
18 THAT STATISTICAL SIGNIFICANCE IS NOT NECESSARY TO THE
19 RELIABILITY OF AN ECONOMETRIC OPINION. THAT WAS AGREED TO BY
20 DR. MURPHY THE FIRST TIME AROUND. I THINK, AGAIN, THAT'S SORT
21 OF BEHIND US ON THE ISSUE. SO I DON'T THINK IT'S HELPFUL TO
22 ZONE IN ON THAT COLUMN.

23 THE COURT: WHAT'S THE CHANGE CORRELATION?

24 MR. GLACKIN: COULD YOU TELL ME WHAT YOU'RE LOOKING
25 AT?

1 THE COURT: I'M LOOKING AT EXHIBIT 2 --

2 MR. GLACKIN: SURE.

3 THE COURT: -- OF THE OPENING REPORT.

4 MR. GLACKIN: OKAY. SO, YOU KNOW, IF IT WOULD BE
5 HELPFUL, I WOULD BE HAPPY TO JUST GO ACROSS THE COLUMNS, OR I
6 CAN JUST FOCUS ON --

7 THE COURT: THAT'S FINE.

8 MR. GLACKIN: -- CHANGE CORRELATION.

9 SO LEVEL CORRELATION IS THE DEGREE TO WHICH THE
10 COMPENSATION LEVELS ARE CORRELATED, SO IF THE AVERAGE
11 COMPENSATION IS A HUNDRED GRAND FOR ONE TITLE, THE QUESTION IS,
12 HOW IS THAT LEVEL CORRELATED TO THE AVERAGES AT ANY GIVEN POINT
13 IN TIME?

14 CHANGE COMPENSATION IS THE RATE OF -- TO WHAT DEGREE ARE
15 THE RATES OF CHANGE CORRELATED?

16 SO WHEN THE -- WHEN THE OTHER COMPENSATION AT THE COMPANY
17 GOES UP BY X PERCENT, 5 PERCENT, WHAT HAPPENS -- HOW MUCH DOES
18 THE COMPENSATION FOR THAT TITLE CHANGE? WHAT PERCENT DOES IT
19 CHANGE?

20 AND THEN THE REGRESSION COEFFICIENTS ARE -- THE
21 CONTEMPORANEOUS COEFFICIENT IS -- BASICALLY IT SAYS HOW MUCH
22 EXPLANATORY POWER IS IN THE -- IS WHAT'S HAPPENING AT THE SAME
23 TIME WITH COMPENSATION TO THE REST OF THE CLASS? HOW MUCH OF A
24 FACTOR IS THAT IN THE PAY OF THE TITLE?

25 THE LAGGED COEFFICIENT, OR VARIABLE, ASKS HOW --

1 THE COURT: WHY DON'T YOU HAVE DATA FOR MOST OF
2 ADOBE'S JOB TITLES? WHY IS IT BLANK?

3 MR. GLACKIN: BECAUSE -- SO YOU'RE TALKING -- SO THE
4 DATA FOR ADOBE TITLES IS BROKEN DOWN BY -- ALL THE DATA IN
5 THESE EXHIBITS IS BROKEN DOWN BY THE NUMBER OF YEARS FOR WHICH
6 WE HAVE DATA FOR A TITLE.

7 FOR EXAMPLE, WE HAVE 11 YEARS OF DATA. SOME OF THESE
8 TITLES ARE IN EXISTENCE FOR ALL 11 YEARS. THAT'S A LOT OF DATA
9 TO WORK WITH.

10 SOME OF THESE TITLES ARE IN EXISTENCE FOR TWO OR THREE
11 YEARS. THAT'S NOT ENOUGH DATA TO WORK WITH.

12 SOME OF THESE TITLES ARE IN EXISTENCE FOR SIX, SEVEN, OR
13 EIGHT YEARS.

14 THE REASON THAT YOU SEE BLANKS ON -- I THINK THE PAGE
15 YOU'RE LOOKING AT FOR ADOBE IS YOU'LL SEE THOSE ARE ALL TITLES
16 FOR WHICH WE ONLY HAVE SIX YEARS OF DATA. THAT IS ENOUGH DATA
17 TO DO THE CORRELATION ANALYSIS, BUT IT IS NOT ENOUGH DATA TO DO
18 THE REGRESSION ANALYSIS, BECAUSE THE REGRESSION ANALYSIS HAS
19 FOUR VARIABLES, AND WITH SIX -- AND ONE OF THOSE VARIABLES IS A
20 RATE OF CHANGE, AND WITH SIX -- I'M GOING TO TRY TO GET THIS
21 RIGHT -- WITH ONLY SIX YEARS OF DATA AND ONE OF YOUR VARIABLES
22 BEING A CHANGE VARIABLE, YOU ONLY HAVE 5 DEGREES OF FREEDOM,
23 WHICH IS NOT ENOUGH DATA. IT'S NOT ENOUGH FREEDOM TO GET ANY
24 KIND OF SENSIBLE ANSWER ABOUT FOUR EXPLANATORY VARIABLES AND
25 ONE DEPENDENT VARIABLE, WHICH IS FIVE VARIABLES TOTAL.

1 THE COURT: WHY DON'T YOU CONTINUE WITH THE
2 CONTEMPORARY AND THE LAGGED VARIABLE?

3 MR. GLACKIN: SURE. SO THE CONTEMPORARY VARIABLE
4 REFLECTS HOW MUCH, HOW MUCH THE JOB TITLE'S COMPENSATION IS
5 EXPLAINED BY WHAT'S HAPPENING AT THE REST OF THE COMPANY.

6 THE LAGGED VARIABLE ASKS HOW MUCH OF THE JOB TITLE'S
7 COMPENSATION, IN THE REGRESSION, IS EXPLAINED BY THE DIFFERENCE
8 BETWEEN THE JOB TITLE AND THE REST OF THE CLASS, THE REST OF
9 THE COMPANY IN THE PRIOR YEAR.

10 SO IN OTHER WORDS, IF THERE WAS A BIG DIFFERENCE, DO WE
11 SEE A CONVERGENCE IN THE SECOND YEAR, OR VICE-VERSA? IT ALLOWS
12 IT TO BE EITHER ONE.

13 AND SO THAT IS TO ACCOUNT FOR THE POSSIBILITY THAT
14 SOMETIMES THE EFFECT OF THE INTERNAL EQUITY ON THE STRUCTURE
15 WILL BE FELT IN A SUBSEQUENT YEAR.

16 AND THEN THE OTHER TWO VARIABLES ARE THE EXTERNAL FACTOR
17 VARIABLES. REVENUE IS THE FIRM'S REVENUE, WHICH ACCOUNTS FOR
18 FIRM PERFORMANCE, YOU KNOW, THE COMPANY HAS A GOOD YEAR, SO
19 EVERYONE GETS PAID MORE; AND -- OR THAT TITLE GETS PAID MORE;
20 AND THE SJ EMP IS SAN JOSE EMPLOYMENT, SO THAT ACCOUNTS FOR THE
21 TECH SECTOR IS HOT, JOBS ARE SCARCE, PAY GOES UP.

22 AND WHAT YOU SEE WHEN YOU LOOK AT THESE IS A LOT OF MOSTLY
23 GOOD SIZED AND POSITIVE COEFFICIENTS ON THE INTERNAL SHARING
24 VARIABLES.

25 THEY'RE NOT ALWAYS POSITIVE AND THEY'RE NOT ALWAYS LARGE.

1 BUT THEY CERTAINLY DON'T GO AWAY WHEN YOU ACCOUNT FOR THE
2 EXTERNAL FACTORS, WHICH IS WHAT WOULD HAPPEN IF THE DEFENDANTS'
3 THEORY OF THE CASE WERE CORRECT.

4 THE COURT: WHAT ABOUT THE NET EFFECT?

5 MR. GLACKIN: OH, SO --

6 THE COURT: UM-HUM.

7 MR. GLACKIN: -- ALL THE NET -- SO T STATUS IS
8 T-STAT, AND THE NET EFFECT IS IF YOU ADD THE CONTEMPORANEOUS
9 AND THE LAGGED VARIABLES TOGETHER, THAT'S THE ANSWER.

10 SO FOR -- IF YOU'RE LOOKING AT EXHIBIT 2, APPLE, YOU SEE
11 THAT FOR THE FIRST ONE, INFORMATION SYSTEMS MANAGER 2, THE
12 CONTEMP IS .8, THE LAGGED IS .04, IF YOU ADD THEM TOGETHER, YOU
13 GET .84.

14 THE COURT: AND WHAT IS THE OBS IN SECTION 6?

15 MR. GLACKIN: THAT IS THE R SQUARED. SO THAT IS
16 THE -- THAT IS JUST A -- THAT IS A STANDARD ECONOMIC, OR
17 STATISTICAL MEASURE OF WHAT'S CALLED GOODNESS OF FIT TO THE
18 DATA. IT TELLS YOU SOMETHING ABOUT HOW MUCH OF THE DEPENDENT
19 VARIABLE IS BEING EXPLAINED BY THE EXPLANATORY VARIABLES.

20 I'M SURE SOMEONE COULD PROBABLY EXPLAIN IT TECHNICALLY
21 BETTER THAN THAT, BUT I THINK EVERYONE AGREES THAT THAT'S
22 GENERALLY WHAT IT IS.

23 THE COURT: LET ME ASK BOTH SIDES, HOW DO YOU EXPLAIN
24 WHY THE TWO EXPERTS CAME OUT WITH CONFLICTING ANALYSIS OF THE
25 ACS DATA? DID THEY DO IT IN DIFFERENT WAYS? DID THEY LOOK AT

1 SOMETHING DIFFERENTLY?

2 MR. GLACKIN: WELL, I DON'T THINK THAT THEIR
3 ANALYSIS -- HOW DID THEY COME OUT WITH CONFLICTING ANALYSIS OF
4 THE ACS DATA?

5 THIS IS THE STATE OF PLAY WITH THE ACS DATA. WHAT
6 DR. MURPHY DID IS HE TOOK ALL OF THE SURVEY DATA FROM ALL OF
7 THESE DIFFERENT JOBS ACROSS THE UNITED STATES AND HE PLUGGED IT
8 INTO A REGRESSION ANALYSIS AND HE SAID, "SEE, I CAN GET
9 POSITIVE RESULTS ON THE SHARING VARIABLES, SO THAT MEANS THAT
10 WHAT DR. LEAMER DID IS INVALID."

11 WHAT DR. LEAMER HAS POINTED OUT IN HIS REBUTTAL REPORT, HIS
12 REPLY OR REBUTTAL REPORT, IS THAT THAT DATA SET IS COMPLETELY
13 UNSUITED TO THIS PURPOSE BECAUSE OF THIS HUGE METHODOLOGICAL
14 FLAW WITH THE WAY THE DATA IS GATHERED.

15 WHAT THE -- WHEN THE SURVEY IS ADMINISTERED TO THE OCCUPANT
16 OF THE HOUSE, A SINGLE PERSON FROM THE HOUSE ANSWERS ON BEHALF
17 OF EVERYBODY IN THE HOUSE AND SAYS THE LOT -- "IN THE LAST 365
18 DAYS, WE HAVE EARNED X AMOUNT OF MONEY," AND THAT SURVEY IS
19 ADMINISTERED EVERY MONTH.

20 SO IN EVERY MONTH, OTHER THAN DECEMBER, YOU'RE GETTING
21 ANSWERS FOR BOTH THE PRIOR YEAR AND -- YOU'RE GETTING AN AMOUNT
22 OF MONEY THAT INCLUDES MONEY FROM THE PRIOR YEAR AND MONEY FROM
23 THE CURRENT YEAR.

24 SO IF THE SURVEY IS ADMINISTERED IN JUNE, HE TELLS YOU, "I
25 EARNED 80 GRAND THIS YEAR," BUT YOU DON'T KNOW WHAT OF THAT 80

1 GRAND WAS EARNED IN 2013 VERSUS WHAT OF THAT 80 GRAND WAS
2 EARNED IN 2012. YOU HAVE NO IDEA.

3 SO THEN DR. MURPHY TAKES THIS DATA SET AND HE USES -- HE
4 APPLIES TO IT CALENDAR YEAR VARIABLES AND GETS THESE RESULTS.

5 AND, YOU KNOW, I DON'T KNOW WHAT, WHAT OTHER ANALYSIS HE
6 DID, BUT THIS ONE IS COMPLETELY INAPPROPRIATE AND IT IS SUBJECT
7 TO A HUGE METHODOLOGICAL FLAW AND THAT'S WHY IT'S NOT RELIABLE.

8 AND THEN AS DR. LEAMER POINTS OUT, THERE -- IF YOU -- IF
9 YOU ASK YOURSELF HOW WELL THESE TITLES ARE CORRELATED WITH ONE
10 ANOTHER IN THE ACS DATA SET, WHAT YOU SEE IS -- AND THIS IS IN
11 HIS REBUTTAL REPORT -- THAT IN THE ACS DATA -- SO THERE ARE --
12 THERE IS ACTUALLY THE KIND OF CORRELATIONS YOU MIGHT EXPECT TO
13 SEE. THERE ARE SOME POSITIVE CORRELATIONS, THERE ARE SOME
14 NEGATIVE CORRELATIONS, AND THEY FALL ROUGHLY EVENLY AROUND 0.

15 IN THE DEFENDANTS' DATA, THE CORRELATIONS ARE ALMOST ALL
16 POSITIVE, AND MOST OF THEM ARE UP AROUND .8 OR .9, AND THAT
17 JUST SHOWS THAT THE ACS DATA IS COMPLETELY UNCOMPARABLE TO THE
18 DEFENDANTS' DATA AND ANALYZING IT IS A POINTLESS EXERCISE UNDER
19 THESE CIRCUMSTANCES.

20 THE COURT: LET ME LET MR. VAN NEST RESPOND TO THE
21 ACS DATA.

22 MR. VAN NEST: AND I WANT TO GO BEYOND THAT A LITTLE
23 BIT.

24 BUT THE ACS DATA JUST PROVES THE BASIC POINT THAT
25 DR. MURPHY IS MAKING, THAT THESE REGRESSIONS DON'T MEAN A

1 THING, AND EVEN LEAMER SAYS THESE ARE LIMITED EXERCISES.
2 LEAMER SAYS THESE DON'T SHOW CAUSATION. HE SAYS IT AT PAGE 525
3 OF HIS DEPO AND, REPEATEDLY, THESE DO NOT SHOW CAUSATION. ALL
4 THEY ARE IS CORRELATION.

5 THE COURT: UM-HUM.

6 MR. VAN NEST: AND THE ACS DATA SHOWS THAT IF WHAT
7 YOU'RE COMPARING IS A TITLE WITHIN A COMPANY TO EVERYBODY IN
8 THE COMPANY, GETTING A POSITIVE CORRELATION DOESN'T TELL YOU
9 WHETHER YOU HAVE A RIGID OR A NON-RIGID STRUCTURE BECAUSE THOSE
10 THINGS WILL TEND TO BE CORRELATED NO MATTER WHAT --

11 THE COURT: UM-HUM.

12 MR. VAN NEST: -- BECAUSE THEY ARE ALL SUBJECT TO THE
13 SAME EXTERNAL FACTORS.

14 LET ME MAKE ANOTHER POINT ABOUT THIS, YOUR HONOR.

15 THE COURT: WHY DO YOU THINK THAT DR. MURPHY GOT THE
16 HIGH, THESE HIGH COEFFICIENTS AND DR. LEAMER GOT THE LOW ONES
17 WITH THE SAME DATA?

18 MR. VAN NEST: I DON'T KNOW EXACTLY WHAT DR. LEAMER
19 DID WITH THE ACS DATA.

20 ALL I KNOW IS THAT DR. MURPHY TRIED TO REPLICATE EXACTLY
21 WHAT LEAMER HAD DONE WITH THE COMPANY DATA. HE USED AVERAGES
22 LIKE LEAMER DID, SO HE WENT ABOUT IT THE SAME WAY LEAMER DID,
23 GOT THE SAME HIGH CORRELATIONS.

24 AND JUST AN EXAMPLE OF THIS, YOUR HONOR --

25 THE COURT: EVEN HIGHER.

1 MR. VAN NEST: IF YOU LOOK -- IF YOU LOOK AT THE
2 CORRELATIONS HE JUST TOLD YOU ABOUT FROM ADOBE --

3 THE COURT: UM-HUM.

4 MR. VAN NEST: -- YOU WILL SEE THE THIRD TITLE DOWN
5 IS A PRINCIPAL SCIENTIST 6.

6 THE COURT: UM-HUM.

7 MR. VAN NEST: THE CORRELATIONS ARE HIGH, AND YET, IF
8 YOU LOOK AT THE RAW DATA FOR THAT ADOBE PRINCIPAL SCIENTIST 6,
9 BEHIND TAB 4 YOU'LL SEE THERE IS ENORMOUS VARIATION, ENORMOUS
10 VARIATION WITHIN THAT TITLE WITHIN THE PEOPLE EMPLOYED THERE.

11 AND SO THAT'S WHY MURPHY SAYS THIS REGRESSION AND
12 CORRELATION MEAN NOTHING. WHEN YOU AVERAGE TO START WITH,
13 YOU'VE TAKEN THE VARIATION OUT.

14 BUT IF YOU COMPARE WHAT HE'S SHOWING AS CORRELATION, HE'S
15 GOT A .86, HE'S GOT A .89 AND .79 ON HIS LEVEL AND CHANGE
16 CORRELATIONS FOR THIS PRINCIPAL SCIENTIST 6.

17 IF YOU LOOK AT THE RAW DATA BEHIND TAB 4, THERE IS AN
18 ENORMOUS AMOUNT OF VARIATION, PROVING OUR POINT THAT THESE
19 REGRESSIONS TELL YOU NOTHING. THEY ARE SET UP USING AVERAGES
20 AND THEY ARE SET UP TO SHOW SOMETHING THAT DOESN'T ANSWER THE
21 RIGHT QUESTION.

22 THE RIGHT QUESTION IS, DOES A CHANGE IN ONE TITLE CAUSE A
23 CHANGE IN OTHER TITLES?

24 HE HASN'T POINTED YOU TO ANY STATISTICAL EVIDENCE TO PROVE
25 THAT. THERE IS NO DOCUMENTARY EVIDENCE TO PROVE THAT.

1 THE FACT THAT WE HAVE A STRUCTURE MEANS NOTHING WHEN THOSE
2 STRUCTURES HAVE 50 TO \$100,000 OF RANGE WITHIN A BAND.

3 AND IF YOU LOOK AT MURPHY 7 AND MURPHY 8, THERE IS
4 ABSOLUTELY NO WAY TO CONCLUDE, OTHER THAN WITH RESPECT TO THESE
5 TITLES --

6 THE COURT: WHAT EXHIBIT NUMBER HAS THE \$100,000
7 RANGE?

8 MR. VAN NEST: EXCUSE ME?

9 THE COURT: WHAT EXHIBIT NUMBER?

10 MR. VAN NEST: IT'S EXHIBIT 7 IN HALLOCK. IT'S
11 EXHIBIT 7 IN HALLOCK, AND HE'S SHOWING AN EXAMPLE THERE OF
12 SALARY RANGES AT GOOGLE. AND THAT'S JUST, YOU KNOW, ONE OF THE
13 COMPANIES. BUT IT'S FIGURE 7 FROM HALLOCK'S REPORT. HE'S
14 GOT -- IT'S FROM HIS MAY 10TH REPORT. HE'S SHOWING A JOB GRADE
15 AT GOOGLE AND YOU CAN SEE THAT --

16 THE COURT: UM-HUM.

17 MR. VAN NEST: -- AT THE HIGH END, IT'S MORE THAN
18 100, AND THEN YOU'VE GOT ANOTHER ONE THAT'S ALMOST A HUNDRED,
19 IT'S 90, ANOTHER ONE THAT'S 70.

20 I MEAN -- AND THIS IS JUST SALARY, YOUR HONOR, BASE. THIS
21 DOESN'T INCLUDE EQUITY.

22 THE COURT: UM-HUM.

23 MR. VAN NEST: IT DOESN'T INCLUDE BONUS.

24 THE COURT: UM-HUM.

25 MR. VAN NEST: AND SO YOU WOULD EXPECT TO SEE THESE

1 WIDE VARIATIONS WITHIN A TITLE --

2 THE COURT: UM-HUM.

3 MR. VAN NEST: -- AND WIDE VARIATIONS BETWEEN AND
4 AMONG TITLES.

5 THE COURT: UM-HUM.

6 MR. VAN NEST: AND I GUESS -- WHEN YOU HAVE LEAMER
7 ADMITTING THAT HE CAN'T SHOW CAUSATION AND YOU HAVE HIM
8 CONCEDING THAT HE CAN'T SAY THE STRUCTURE IS SO RIGID THAT
9 THERE WOULD BE PROPAGATION, ADD THAT TO APPENDIX E, WHICH IS
10 TAB 11 IN WHAT I HANDED UP, YOUR HONOR. APPENDIX E IS THE LIST
11 OF 2400 JOB TITLES THAT THEY'RE TRYING TO STAND HERE AND TELL
12 YOU ARE ALL MOVING TOGETHER AND ALL CAUSE ONE TO THE OTHER.

13 IT'S LUDICROUS. YOU CAN GO TO ANY PAGE OF THIS AND SEE AN
14 ENORMOUS AMOUNT OF VARIATION ON ALL THESE COMPANIES.

15 INTEL, 800 TITLES.

16 APPLE, 350 TITLES.

17 GOOGLE, 300 TITLES.

18 AND JUST LOOK AT THE RANGE. PICK UP THE FIRST PAGE OF
19 INTEL: ASSEMBLY TD PROCESSOR AND INTEGRATOR; YOU'VE GOT A CAD
20 ENGINEERING MANAGER; YOU'VE GOT A CHEMICAL ENGINEER; A CIRCUIT
21 DESIGN ENGINEER; CONSTRUCTION PROJECT MANAGER; CONSULTING
22 ENGINEERING MANAGER; FAILURE ANALYSIS ENGINEER. IT GOES ON AND
23 ON AND ON AND ON.

24 AND WITH 2400 OF THESE, THE IDEA THAT THEY -- THAT THERE'S
25 SOME, QUOTE, LINKAGE WITHIN COMPANIES IS ABSOLUTELY CRAZY.

1 AND THAT'S WHY THERE ISN'T ANY STATISTICAL EVIDENCE. THERE
2 IS NONE. THE STATISTICAL EVIDENCE POINTS THE OTHER WAY. HUGE
3 VARIATION, WIDE DISCRETION, BIG DIFFERENCES YEAR TO YEAR.

4 MR. GLACKIN: I --

5 MR. VAN NEST: AND SO WHAT THEY'RE ASKING YOU TO
6 DO -- THIS IS A SWING FOR THE FENCES TYPE PLAY. IT'S BIGGER BY
7 A FACTOR OF THREE THAN ANY SIMILAR CASE THAT'S -- WHERE IT'S
8 EVEN BEEN REQUESTED.

9 AND IN REED AND THE OTHER CASES THAT WE CITED, YOUR HONOR,
10 WEISFELDT AND FLEISHMAN, MUCH SMALLER CLASSES WITH SINGLE JOB
11 TITLES WERE NOT CERTIFIED.

12 THE COURT: UM-HUM.

13 MR. VAN NEST: AND THAT'S BEFORE COMCAST SAID YOU
14 HAVE TO MAKE A RIGOROUS ANALYSIS OF THE DATA AND SEE HOW
15 RELIABLE AND PERSUASIVE IT IS IF WHAT THEY WANT IS SOMETHING
16 THIS BIG WHERE THEY'RE GOING TO PROVE IN ONE TRIAL ALL OF THIS,
17 ALL THIS STUFF.

18 NOW, YOU OFFERED THEM SOMETHING LESS AND THEY DON'T WANT
19 IT, AND THAT SOMETHING LESS WAS, LET'S TRY THE CONSPIRACY ISSUE
20 FIRST.

21 THEY'VE GOT TO PROVE IMPACT ACROSS THE CLASS AND THEY
22 HAVEN'T DONE IT. THE DATA DON'T REFLECT IT. THERE ARE NO
23 DOCUMENTS THAT REFLECT THAT.

24 AND SO WE NEED TO THINK ABOUT ANOTHER WAY TO RESOLVE THIS
25 CASE, AND I THINK COMING BACK TO THE IDEA OF LETTING PEOPLE, IN

1 EFFECT, OPT INTO A MASS ACTION WHERE WE CAN ACTUALLY MANAGE HOW
2 IT GETS TRIED AND WHAT PORTIONS OF IT GET TRIED AND HOW WE CAN
3 SET OURSELVES UP TO RESOLVE THIS IS A LOT BETTER THAN THIS HAIL
4 MARY WHERE THEY WANT 60,000 PEOPLE IN A CLASS WITH 2400 TITLES.

5 IT'S JUST GOING TO BE A MESS AND WE'RE BETTER OFF SAYING NO
6 NOW. BECAUSE THEY DIDN'T TAKE YOUR MORE LIMITED OFFER, LET'S
7 SAY NO AND FIGURE OUT ANOTHER BETTER WAY TO DO THIS, WHICH, AS
8 I SAY, IS HOW WE'RE TRYING THESE TORT CASES AROUND CALIFORNIA
9 AND THE UNITED STATES NOW MORE AND MORE.

10 WITH THESE STANDARDS BEING IMPOSED FROM COMCAST AND ELLIS
11 AND AMGEN AND ALL THIS, WHAT COURTS ARE DOING IS REFUSING TO
12 CERTIFY AND FINDING A BETTER WAY, USUALLY A MASS APPROACH WHERE
13 PEOPLE MAKE THEIR CLAIMS AND WE TRY, IN A BELLWETHER TRIAL, A
14 SERIES OF THOSE.

15 THAT'S THE WAY THIS CASE SHOULD BE RESOLVED. THAT'S A LOT
16 FAIRER TO THE DEFENDANTS. IT'S A LOT BETTER ACROSS THE BOARD.
17 WE'LL GET A BETTER RESULT.

18 THIS CLASS CAN'T STAND UP.

19 THE COURT: ALL RIGHT. LET ME INTERRUPT YOU ONE
20 SECOND.

21 MR. VAN NEST: YEAH.

22 THE COURT: LET ME ASK MR. GLACKIN, LAST TIME YOU HAD
23 MENTIONED THAT YOU MIGHT BE INTRODUCING THE STATISTICAL
24 EVIDENCE FOR FALSIFICATION PURPOSES.

25 ARE YOU DOING THAT NOW, OR THAT'S NOT REALLY AN ISSUE

1 ANYMORE?

2 MR. GLACKIN: I DON'T THINK THAT THAT'S A VERY
3 IMPORTANT ISSUE.

4 THE COURT: OKAY.

5 MR. GLACKIN: CAN I RESPOND TO SOME OF THAT?

6 THE COURT: WELL, I'M GOING TO -- I'D LIKE TO WRAP
7 UP, AND I ALSO WANT TO HAVE A LITTLE BIT OF A CMC, BUT I WANT
8 TO FINISH IN THE NEXT TEN, NO LATER THAN THE NEXT TEN MINUTES.

9 SO --

10 MR. VAN NEST: ME, TOO, YOUR HONOR.

11 THE COURT: YES, I KNOW. YOU HAVE A FLIGHT TO CATCH,
12 RIGHT?

13 MR. VAN NEST: I DO.

14 THE COURT: OKAY. IS IT OKAY IF WE GO TO 5:30?

15 MR. VAN NEST: SURE.

16 THE COURT: OKAY.

17 MR. GLACKIN: THERE'S JUST A COUPLE OF POINTS IN THAT
18 THAT I THINK I CAN RESPOND TO RATHER BRIEFLY IF IT'S ALL RIGHT.

19 THE COURT: OKAY. VERY QUICK.

20 MR. GLACKIN: SO FIRST OF ALL, THE RIGOROUS ANALYSIS
21 STANDARD IS NOT NEARLY -- IT'S BEEN AROUND FOR 30 YEARS.
22 DUKES, COMCAST, AMGEN, NONE OF THOSE CASES CHANGE IT. IT'S
23 BEEN AROUND FOREVER. IT'S BEEN AROUND SINCE EISEN.

24 SECOND OF ALL, THIS IS NOT A BIG CLASS. THIS IS NOT A
25 PARTICULARLY LARGE OR COMPLICATED CLASS ACTION. I MEAN, WE

1 REGULARLY CERTIFY, IN ANTITRUST CASES, CLASS ACTIONS WITH
2 THOUSANDS OF PRODUCTS, THOUSANDS OF PURCHASERS. IT IS THE --
3 IT IS THE REASON -- THE FACT THAT CLASS RELIEF --

4 THE COURT: CAN I -- LET ME INTERRUPT YOU AND ASK A
5 QUESTION. YOU KNOW, JUDGE BREYER RECENTLY DENIED CLASS CERT TO
6 THE SMALLER 150,000 MEMBER WAL-MART CLASS, AND ONE OF HIS
7 COMMENTS IN HIS CONCLUSION WAS, "LOOK, IT'S KIND OF ARBITRARY
8 HOW YOU CHOSE TO NARROW THIS. YOU KNOW, THE GEOGRAPHICAL
9 REGIONS YOU CHOSE ARE REALLY NOT ANY DIFFERENT THAN ANY OTHER
10 REGIONS WHERE WAL-MART OPERATES."

11 WHAT -- HOW WOULD YOU RESPOND TO -- YOU KNOW, WHAT
12 JUSTIFIES THIS TECHNICAL CLASS? AND MAYBE I'M PARTIALLY TO
13 BLAME FOR THIS, BUT WHAT JUSTIFIES THIS VERSUS THE ALL EMPLOYEE
14 CLASS? OR WHAT -- YOU KNOW, WHAT --

15 MR. GLACKIN: SO THE -- THE SUBSEQUENT DISCOVERY THAT
16 WE'VE TAKEN SINCE THE HEARING --

17 THE COURT: UH-HUH.

18 MR. GLACKIN: -- HAS CONFIRMED THAT THESE AGREEMENTS
19 WERE PARTICULARLY TARGETED AT HIGH TECH WORKERS.

20 THE -- SO THERE'S A LITTLE BIT MORE EVIDENCE ABOUT THAT IN
21 THE RECORD NOW THAT WE ALSO CITED.

22 BUT THE SELECTION OF THIS GROUP OF PEOPLE WAS NOT AT ALL
23 ARBITRARY. I MEAN, THE DEFENDANTS THEMSELVES, SEVERAL OF
24 THEM -- AND THIS IS ALL IN APPENDIX B TO DR. LEAMER'S FIRST
25 REPORT -- SEVERAL OF THESE DEFENDANTS SEGMENT THEIR EMPLOYEES

1 INTO TECH AND NON-TECH. GOOGLE PUTS A "T" NEXT TO EVERY
2 EMPLOYEE AND EVERY JOB TITLE THAT IT CONSIDERS TO BE TECHNICAL,
3 SO WE INCLUDED THOSE. WE EXCLUDED THE OTHER ONES.

4 YOU KNOW, THIS IS A DIFFERENTIATION THAT'S BEING DRIVEN BY
5 THE DEFENDANTS' OWN APPROACH TO THEIR EMPLOYEES.

6 AND THEN IN ADDITION TO THAT, WE'VE ASKED DR. HALLOCK, WHO
7 IS A LEADING EXPERT ON COMPANY PAY SYSTEMS AND HOW COMPANIES
8 ORGANIZE AND COMPENSATE THEIR EMPLOYEES, HE'S REVIEWED THE
9 TECHNICAL CLASS AND HE'S OFFERED THE OPINION THAT, FIRST OF
10 ALL, IT'S A SENSIBLE COLLECTION THAT IS CONSISTENT WITH THE WAY
11 THAT COMPANIES ORGANIZE THEIR JOB FAMILIES TO REFLECT
12 PARTICULAR FUNCTIONS WITHIN THE FIRM, AND HE'S ALSO OFFERED THE
13 OPINION THAT HARM LIKELY WOULD HAVE BEEN CONCENTRATED ON THE
14 TECHNICAL CLASS GIVEN THE NATURE OF THE AGREEMENTS.

15 SO IT WAS NOT AN ARBITRARY DECISION AT ALL.

16 THE COURT: ALL RIGHT. LET ME DO A LITTLE
17 HOUSEKEEPING AND THEN I'M GOING TO GIVE YOU THE LAST COUPLE
18 MINUTES TO WRAP UP TO SAY WHATEVER, HOWEVER YOU WISH TO CLOSE.

19 LET'S HAVE THE FURTHER CMC ON OCTOBER 3RD, WHICH IS WHEN
20 WE'RE GETTING TOGETHER ANYWAY FOR THE PRELIMINARY APPROVAL.
21 DOES THAT SOUND OKAY?

22 MR. VAN NEST: THAT'S FINE, YOUR HONOR.

23 THE COURT: ALL RIGHT. I WOULD -- IN LIGHT OF THE
24 THREE DEFENDANTS SETTLING, I'D LIKE TO REDUCE SOME OF THE PAGE
25 LIMITS THAT I HAD PREVIOUSLY SET FOR PRETRIAL DOCUMENTS.

1 MR. VAN NEST: COULD I JUST BRIEFLY MAKE A PLEA THAT
2 YOU NOT DO THAT, YOUR HONOR?

3 WE'RE HAVING -- WE HAVE -- IT'S STILL FOUR DEFENDANTS. WE
4 EACH HAVE ISSUES THAT WE NEED TO PRESS. WE'RE NOT ALL THE
5 SAME.

6 AND HONESTLY, IF THEIR POSITION IS THAT ALL THE SAME
7 EVIDENCE AND STUFF IS RELEVANT, IT SHOULDN'T CHANGE THE PAGE
8 LIMITS.

9 I WOULD JUST LEAVE IT AT THAT, YOUR HONOR, AND ASK YOU
10 PLEASE NOT TO DO THAT. IT'S ALREADY REALLY TIGHT.

11 THE COURT: WELL, THIS IS WHAT I'LL DO. LET'S TALK
12 ABOUT THIS -- SINCE IT'S A LATE HOUR NOW, LET'S TALK ABOUT THIS
13 ON OCTOBER 3RD SINCE WE HAVE TIME. NONE OF THOSE DEADLINES ARE
14 GOING TO RUN UNTIL, I THINK, FEBRUARY.

15 MR. VAN NEST: GOOD TO GO.

16 THE COURT: OR JANUARY. BUT IF YOU WOULD AT LEAST
17 TALK ABOUT MAYBE YOU COULD SHAVE SOME OFF HERE AND THERE. I
18 MEAN, THESE LIMITS WERE SET ASSUMING ALL SEVEN DEFENDANTS WOULD
19 BE PARTICIPATING. SO IF YOU WOULD PLEASE AT LEAST CONSIDER
20 SOME LIMITS AND THEN PUT YOUR PROPOSAL IN THE JOINT CASE
21 MANAGEMENT STATEMENT.

22 MR. VAN NEST: CERTAINLY WE WILL.

23 THE COURT: ALL RIGHT. SO -- WELL, I WAS GOING TO
24 MAKE SOME PAGE REDUCTIONS, BUT IF YOU WANT ME TO HOLD OFF ON
25 THAT, THEN I DON'T THINK THAT --

1 MR. VAN NEST: PLEASE.

2 THE COURT: -- THERE'S ANYTHING MORE WE NEED TO DO ON
3 THE CMC.

4 MR. VAN NEST: THANK YOU.

5 MR. SAVERI: I THINK THAT'S FINE. WE'LL WORK IT
6 OUT --

7 MR. VAN NEST: WE'LL WORK IT OUT.

8 MR. SAVERI: -- AFTER MR. VAN NEST'S SOJOURN.

9 THE COURT: I WOULD APPRECIATE ANY SHAVING.

10 MR. SAVERI: YOU GOT IT.

11 MR. VAN NEST: WE KNOW THAT, YOUR HONOR.

12 THE COURT: OKAY. AND ALSO IF YOU WOULD GIVE ME A
13 NEW TRIAL ESTIMATE AS WELL, YOU KNOW, DEPENDING ON WHO IS LEFT
14 TO TRY THE CASE, WHETHER THAT WOULD ACTUALLY CHANGE THE LENGTH
15 OF THE TRIAL.

16 MR. SAVERI: SO WE HAVE 17 DAYS. YOU WANT TO SEE IF
17 WE CAN TRIM THAT BACK?

18 THE COURT: YEAH. I JUST WANT TO KNOW, IS THERE A
19 NEW ESTIMATE NOW THAT THERE ARE THREE FEWER DEFENDANTS?

20 MR. SAVERI: OH, OKAY.

21 THE COURT: OKAY. WHY DON'T -- WE'LL KEEP EVERYTHING
22 AS IS, BUT IF YOU WOULD PLEASE MEET AND CONFER AND MAKE SOME
23 PROPOSALS.

24 MR. VAN NEST: WE'LL DO THAT.

25 THE COURT: OKAY. LET ME GIVE THE LAST, REALLY, TWO

1 MINUTES, BECAUSE POOR MS. SHORTRIDGE IS PROBABLY GOING TO LOSE
2 HER ARMS IN A MINUTE, JUST THE LAST TWO MINUTES OF YOUR
3 STRONGEST WHATEVER YOU WANT TO SAY ON IMPACT OR WHY THIS SHOULD
4 BE CERTIFIED OR --

5 MR. GLACKIN: WELL, THERE'S ONE, ONE POINT I WANTED
6 TO MAKE.

7 MR. VAN NEST SAID THAT DR. LEAMER ADMITTED NOTHING HE DOES
8 CAN SHOW CAUSALITY AND HE CITED TO 525 OF THE DEPOSITION OF
9 DR. LEAMER.

10 I WENT IMMEDIATELY TO THE EXCERPTS THAT WE HAVE THAT WERE
11 SUBMITTED BY THE DEFENDANTS. I DIDN'T SEE THAT PAGE, SO I
12 CAN'T CONFIRM THAT HE DID SAY THAT.

13 BUT I WAS AT HIS DEPOSITION. I DON'T REMEMBER HIM EVER
14 SAYING THAT.

15 AND HE EXPRESSLY SAYS IN HIS FINAL REPORT THAT THE KIND OF
16 REGRESSION ANALYSIS HE'S DONE, WHICH INCLUDES TEMPORAL ORDERING
17 AND ALSO INCLUDES ACCOUNTING FOR THE EXTERNAL FACTORS THAT THE
18 DEFENDANTS HAVE CLAIMED ARE IMPORTANT, CAN SUPPORT AN INFERENCE
19 OF CAUSALITY.

20 SO, YOU KNOW, WE HAVE -- I'M ONLY GOING TO -- YOU'VE HEARD
21 A LOT OF ARGUMENT TODAY. I'M NOT GOING TO WALK THROUGH IT ALL
22 AGAIN.

23 ALL I WILL SAY IS THAT, YOU KNOW, WE SORT OF UNDERSTOOD
24 THERE TO BE A SPECIFIC ISSUE, A DEFICIENCY THAT HAD BEEN RAISED
25 WITH RESPECT TO THE EVIDENCE THAT WE HAD SUBMITTED. WE HADN'T

1 SHOWN MOVEMENT OVER TIME, WE HADN'T EXPANDED THE ANALYSIS TO
2 THE ENTIRE STRUCTURE, AND WE HADN'T ACCOUNTED FOR EXTERNAL
3 FACTORS.

4 WE'VE NOW DONE ALL THREE OF THOSE THINGS. WE HAVE
5 COMPLETED ALL THE INFERENTIAL LINKS THAT THE DEFENDANTS
6 COMPLAINED ABOUT LAST TIME, AND THAT'S WHY, INSTEAD OF SAYING
7 WE HAVEN'T, THEY'RE JUST FOCUSSING BACK ON THIS QUESTION OF
8 INDIVIDUAL VARIATION AND SAYING THAT IT MATTERS.

9 BUT IN THE TEXT OF HIS DEPOSITION THAT WE BLOCK QUOTED IN
10 OUR REPLY BRIEF, DR. MURPHY ADMITS THAT IT DOESN'T MATTER, THAT
11 WIDE VARIATION IN INDIVIDUAL PAY IS NOT INCONSISTENT WITH A JOB
12 TITLE STRUCTURE HELD TOGETHER BY INTERNAL EQUITY.

13 AND SO WHAT THAT TELLS YOU IS WE HAVE -- WE HAVE NOT JUST
14 GIVEN THE COURT A PLAUSIBLE METHODOLOGY. AT THIS POINT WE HAVE
15 GIVEN THE COURT, I THINK, SIGNIFICANT PROOF OF ANTITRUST
16 IMPACT, FAR MORE SIGNIFICANT PROOF THAN I HAVE SEEN IN AN
17 ANTITRUST CLASS CASE.

18 SO I RESPECTFULLY SUBMIT WE'VE MORE THAN CLEARED THE HURDLE
19 ON THAT ONE.

20 MR. VAN NEST: SO, YOUR HONOR, I'LL STICK WITH THE
21 KEY POINTS IN THE TABS I HANDED UP. I THINK THEY TELL THE
22 STORY.

23 AND LET ME TELL IT JUST FROM THE VERY HIGHEST POINT. THERE
24 ARE THREE REASONS WHY THEY FAIL THE TEST THAT COMCAST SETS OUT.
25 COMCAST SAYS RIGOROUS ANALYSIS, YOU'VE GOT TO PROVE CLASS-WIDE

1 INJURY, WHICH YOU'VE INTERPRETED, I THINK CORRECTLY SO, AS ALL
2 OR NEARLY ALL PEOPLE.

3 ONE. LEAMER AVERAGED AND THE CASE LAW UNIFORMLY REJECTS
4 THAT. GPU REJECTED IT, REED REJECTED IT, AND IT'S BEEN
5 UNIFORMLY REJECTED THAT AVERAGING CAN ALLOW YOU TO SHOW
6 CLASS-WIDE IMPACT.

7 IT CAN'T, BECAUSE THE WAY THE AVERAGE MOVES DOESN'T TELL
8 YOU ANYTHING ABOUT HOW MANY PEOPLE WERE IMPACTED. THAT'S POINT
9 ONE.

10 POINT TWO. THE RAW DATA THAT WE LOOKED AT IN TABS 4, 5, 6,
11 AND 7 SHOWS TWO THINGS CLEARLY AS A BELL. ONE, THERE IS
12 ENORMOUS VARIATION WITHIN EACH JOB TITLE BECAUSE THE BANDS ARE
13 BROAD, BECAUSE THERE IS SALARY, BONUS AND EQUITY ALL IN PLAY,
14 AND FOR ALL THESE TITLES, AND MURPHY LOOKED AT EVERY ONE, THERE
15 IS A WIDE RANGE OF VARIATION WITHIN THE TITLE.

16 AND POINT TWO, THERE IS NO SHOWING THAT MOVING ONE TITLE
17 CAUSES ANY OTHER TITLE TO MOVE. THAT'S THE POINT OF MURPHY 7
18 AND MURPHY 8. THERE IS ENORMOUS VARIATION BETWEEN AND AMONG
19 TITLES.

20 AND THE THIRD POINT IS THEY SIMPLY HAVEN'T SHOWN THIS
21 RIPPLE EFFECT OR HOW THE HECK IT WOULD WORK. WE KEEP ASKING,
22 WHAT DO YOU HAVE TO SHOW CAUSATION? WHAT DO YOU HAVE -- WHAT
23 IS YOUR THEORY OF PROPAGATION?

24 THEY DON'T REALLY HAVE A THEORY OF PROPAGATION BECAUSE
25 THERE'S NO EVIDENCE OF IT, THERE'S NO ANECDOTES OF IT EITHER

1 BEFORE, DURING, OR AFTER THE CLASS PERIOD.

2 THIS RIPPLE THEORY IS A MADE UP THEORY THAT THE EVIDENCE
3 WILL NOT SUPPORT, AND WITHOUT THAT, WITHOUT THAT, THEY CAN'T
4 SHOW CLASS-WIDE INJURY.

5 MY FINAL POINT, YOUR HONOR, IS JUST APPENDIX B. 2400
6 TITLES, 60,000 CLASS MEMBERS. IT'S NOT THAT THAT'S A BIG CLASS
7 AMONG ALL THE CLASSES IN THE UNITED STATES. IT'S THAT THAT'S
8 AN ENORMOUS CLASS FOR ANY WAGE SUPPRESSION CASE.

9 REED SAID 19,000, TOO MANY.

10 FLEISHMAN, EVEN LESS THAN THAT, TOO MANY.

11 WEISFELDT, LESS THAN THAT, TOO MANY.

12 AND THE REASON IS THAT WHEN YOU HAVE THIS MUCH DISPARITY
13 AND DIFFERENCE BETWEEN AND AMONG THESE TYPES OF JOBS, THERE IS
14 NO WAY TO SHOW THAT IMPACT ON SOME OF THEM WOULD HAVE IMPACTED
15 ALL OR NEARLY EVERYONE, ESPECIALLY WHEN THEY'RE SWINGING FOR
16 THE FENCE WITH A 2400 TITLE PROPOSED CLASS.

17 IT IS UNWORKABLE. IT IS UNPRECEDENTED. THEY CAN'T POINT
18 TO A SINGLE CASE WHERE ANYTHING EVEN APPROACHING THIS WAS
19 CERTIFIED, NOT ONE. THEY HAVEN'T CITED ONE.

20 THERE ISN'T ONE BECAUSE THE CASES THAT ARE ANYWHERE NEAR
21 THIS ARE ALL CASES DENYING CLASS CERT.

22 AND THAT'S WHY WE EMPHASIZE REED, WEISFELDT, FLEISHMAN AND
23 THE LIKE. THEY ALL RECOGNIZE WHAT WE RECOGNIZE, THAT AVERAGING
24 DOESN'T TELL YOU ANYTHING, AND YOU CAN'T RUN A CLASS ACTION IN
25 THIS WAY.

1 LET'S SAY NO AND GET ON TO A MORE REASONABLE WAY OF DOING
2 THIS AND FIGURE OUT A BETTER WAY TO RESOLVE THESE CLAIMS.

3 THANKS FOR YOUR ATTENTION, YOUR HONOR.

4 THE COURT: ALL RIGHT. WELL, THANK YOU ALL VERY
5 MUCH. I REALLY APPRECIATE IT. THANKS FOR YOUR PATIENCE TODAY.

6 MR. GLACKIN: THANK YOU, YOUR HONOR.

7 MR. VAN NEST: THANK YOU, YOUR HONOR.

8 (THE PROCEEDINGS IN THIS MATTER WERE CONCLUDED.)

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3 CERTIFICATE OF REPORTER
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7 I, THE UNDERSIGNED OFFICIAL COURT REPORTER OF THE UNITED
8 STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,
9 280 SOUTH FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY
10 CERTIFY:

11 THAT THE FOREGOING TRANSCRIPT, CERTIFICATE INCLUSIVE, IS
12 A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE
13 ABOVE-ENTITLED MATTER.

14
15 *Lee-Anne Shortridge*
16

17 LEE-ANNE SHORTRIDGE, CSR, CRR
CERTIFICATE NUMBER 9595
18 DATED: AUGUST 19, 2013
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